Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CSX Transportation, Inc., *Petitioner*,

v.

Leonard Adams, *et al.*, *Respondents*.

On Petition for a Writ of Certiorari
To The Louisiana Court of Appeal, Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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81 pp

QUESTIONS PRESENTED

CSX Transportation, Inc. ("CSXT"), submits that the issues appropriate for this Court's review are whether:

1) Plaintiffs' state-law claim for punitive damages against CSXT is expressly preempted by the Federal Railroad Safety Act.
2) The U.S. Secretary of Transportation has promulgated regulations covering the subject matter of Plaintiffs' claim for punitive damages, *i.e.*, inspection of tank cars arriving at interchange.
3) The state appellate court's legal analysis in rejecting federal preemption conflicts with *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993).

PARTIES TO THE PROCEEDING

Petitioner certifies the following list of all parties to the proceeding in the court whose judgment is sought to be reviewed:

Plaintiff class of approximately 8,000 persons certified by the Civil District Court for the Parish of Orleans, State of Louisiana, and affirmed by the Fourth Circuit Court of Appeal, State of Louisiana at *Adams v. CSX Railroads*, 615 So. 2d 476 (La. App. 4th Cir. 1993). The court-approved class representatives are as follows:

Sub-Class A (psychological damages)
- Peter Armstrong, Jr.
- Ottomese R. Coleman
- Karen E. Debose
- Nellie Mae Givens
- Muriel McLain Noah
- Ernest Rodney
- Gloria Theophile
- Hilda Tyler

Sub-Class B (physical damages)
- James Steven Armour
- Richard Bell
- Doris Jackson
- Charles H. McField
- Thelma Wills Riley
- Preston Leroy Smith
- Lawrence T. Weathersby

Sub-Class C (economic damages)
Eve Blache
Elver M. Burke
Charles L. Givens
Walter T. Hunley (Sugar Bowl Lanes)
Lewis Jackson, Sr.
Frank Fon Jee (Sam Wing Laundry)
Michael D. Noah
Omelia Stampley
Sub-Class D (incompetence)
George J. Lee, Jr., on behalf of Gerard M. Lee, George J. Lee, III, and Vonette R. Lee
Irma Barnes on behalf of Halsie Lee Ratliff (deceased), Jan K. Overton (deceased), and Trevis D. Overton

Albert Mims
New Orleans Terminal Co.
Norfolk Southern Corp.
Norfolk Southern Railway Co.
The Alabama Great Southern Railroad Co.
Louisiana Southern Railway
Mitsui & Company (U.S.A.), Inc.
Illinois Central Railroad Company
Phillips Petroleum Co.
Phillips 66 Co.
AMF-BRD (formerly AMF Beaird, Inc.)
General American Transportation Corp
GATX Corp.
GATX Leasing Corp.
GATX Terminals Corp.
Beaird Industries, Inc. (formerly Riley-Beaird, Inc.)
United States Riley Corp.
The Riley Company

APAC, Inc.
ATEC, Inc.
Novacor Chemicals, Inc. (formerly Polysar, Inc.)
Polysar, Ltd.

CORPORATE-ENTITY LISTING

Pursuant to this Court's Rules 14.1(b) and 29.6, Petitioner certifies the following list of all of its parent companies and nonwholly owned subsidiaries:

CSX Corporation (parent)
Allegheny and Western Railway Company
Baltimore and Cumberland Valley Rail Road Extension Company
Central Inter Terminal Railroad Company
The Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Home Avenue Railroad Company

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

CSX TRANSPORTATION, INC., *Petitioner*,

v.

LEONARD ADAMS, *et al.*, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FOURTH CIRCUIT

CSX Transportation, Inc. ("CSXT"), respectfully petitions for a writ of certiorari to review the decree of the Louisiana Court of Appeal, Fourth Circuit, in this case.

CITATIONS TO OPINIONS BELOW

The Supreme Court of Louisiana's denial of supervisory writ (Pet. App. D1) is reported at 96-0977 (La. 6/28/96), 675 So. 2d 1121. The decision of the Louisiana Court of Appeal, Fourth Circuit, (Pet. App. C1-C19) is reported at 95-2710 (La. App. 4 Cir. 3/20/96), 671 So. 2d 540. The opinions of the district court (Pet. App. A1-A10, B1-B4) are not reported.

STATEMENT OF JURISDICTION

The decree of the district court was entered on July 15, 1995. The district court denied reconsideration on November 30, 1995. The appellate court affirmed the district court on March

20, 1996. The Supreme Court of Louisiana denied CSXT's application for supervisory writ on June 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and under the authority of this Court's decisions in *Belknap, Inc. v. Hale*, 453 U.S. 491, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983), and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).

The Louisiana Court of Appeal, Fourth Circuit, has decided an important federal question in a way that conflicts with *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), the relevant decision of this Court for express preemption under the Federal Railroad Safety Act. The appellate court's decision seriously erodes the federal policy regarding express preemption of state law standards for rail-safety matters that are covered by the regulations promulgated by the U.S. Secretary of Transportation. Further, this Court's immediate review of the federal preemption issue raised by this Petition is the best way to avoid economic waste. A finding of federal preemption here will preclude further litigation on what law controls a railroad's duty to inspect a rail car at interchange and will resolve that issue with respect to punitive and compensatory damages.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The United States Constitution provides in Article VI, Clause 2: This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.

Section 101 of the Federal Railroad Safety Act, 45 U.S.C. § 421, provides: The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents. . . .

Section 202 of the Federal Railroad Safety Act, 45 U.S.C. § 431, provides: The Secretary of Transportation. . . shall prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety. . . .

Section 205 of the Federal Railroad Safety Act, 45 U.S.C. § 434, provides: The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. . . .

The regulations of the U.S. Department of Transportation, at 49 C.F.R. § Section 174.14(a), provide: A carrier must forward each shipment of hazardous materials promptly and within 48 hours (Saturdays, Sundays, and holidays excluded), after acceptance at the originating point or receipt at any yard, transfer station, or interchange point, except that where biweekly or weekly service only is performed, a shipment of hazardous materials must be forwarded on the first available train.

The regulations of the U.S. Department of Transportation, at 49 C.F.R. § 174.8(b), provide: At any point where a train is required to be inspected, each loaded placarded rail car and each rail car immediately adjacent thereto must be inspected. The cars may continue in transit only when the inspection indicates that the cars are in a safe condition for transportation. (See §§ 174.9 and 174.10.) The inspection of a rail car other than a tank car or a rail car containing Class A explosives must include a visual inspection for obvious defects of the running gear and any leakage of contents from the car and to determine whether all

required placards are in place and conform to the information given on the train consist or other shipping document as required by § 174.8(b).

Article 2315.3 (repealed)[1] of the Louisiana Civil Code provided: In addition to general and specific damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances. . . .

STATEMENT OF CASE

Petitioner, CSX Transportation, Inc. ("CSXT"), here seeks this Court's review of the ruling of the Louisiana Court of Appeal, Fourth Circuit, affirming the denial of CSXT's Motion for Summary Judgment on Plaintiffs' claim for exemplary (or punitive) damages[2] under La. Civ. Code art. 2315.3. The Supreme Court of Louisiana denied CSXT's application for review.

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[1]The Louisiana Legislature repealed article 2315.3 in 1996. CSXT's motion for summary judgment on Plaintiffs' article 2315.3 claim arose in the context of the district court's case management order sequencing motion practice on punitive-damage issues in advance of other dispositive motions. Amendment to Case Management Plan Order #10, Order Establishing Management Plan for Class Action Trial (1/23/95) at 2. A resolution of the preemption issue will have the same effect on Plaintiffs' claims for compensatory damages. The repeal of article 2315.3 does not change the issue of what law governs railroad inspections at interchange.

[2]Under Louisiana law, "exemplary damages" and "punitive damages" have the same generally prevailing meaning and are used interchangeably. See, e.g., *Vincent v. Morgan's Louisiana & T.R. & S.S. Co.*, 74 So. 541, 545 (La. 1917).

A. Factual Background.

This class action arose out of a fire involving rail tank car GATX 55996 (the "Tank Car") travelling in interstate commerce through the city of New Orleans. The fire occurred at approximately 1:50 a.m. on Wednesday, September 9, 1987. The Tank Car's butadiene[3] lading apparently leaked around a misaligned gasket and ignited. The gasket was intended to seal the bottom manway closure assembly on the underside of the Tank Car. At the time of ignition, the Tank Car was sitting at an interchange point in the CSXT Terminal Junction Interchange Yard.

CSXT is an interstate common carrier by rail. It operates a rail system comprising approximately 19,000 miles of trackage located in 20 states, the District of Columbia and the Province of Ontario, Canada. CSXT was not the owner of the rail car that experienced the leak. As a common carrier, CSXT must accept for interstate shipment a tank car that is tendered in compliance with applicable federal regulations. The federal transportation regulations establish uniform nationwide requirements for the preparation and packaging of hazardous materials for shipment by rail and establish responsibilities for persons who test or repair containers used for the transportation of hazardous materials. 49 C.F.R. Part 173. Those same regulations specify that the shipper (not the common carrier) is the proper party to appreciate the danger posed by the commodity shipped. See 49 C.F.R. §§ 172.400(a), 172.401, 172.500(a). The shipper must select the proper container for the lading and certify its soundness; *i.e.*, that it will not leak during transportation through interstate com-

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[3]CSXT assumed *arguendo* that butadiene constitutes a "hazardous or toxic substance" for purposes of article 2315.3.

merce. See id., § 173.22. "No person may offer for transportation a tank car containing a hazardous material. . . unless that person determines that the tank car is in proper condition and safe for transportation." Id., § 173.31(d)(1).

At about 7:25 p.m. on September 8, 1987, New Orleans Terminal Company ("NOTC") moved the Tank Car (along with five other cars containing butadiene, including one other of the same design but with an asbestos-gasketed bottom manway), to an interchange point at the CSXT Terminal Junction Interchange Yard. An interchange point is a place where rail cars are left by one carrier to be picked up, at a later point in time, for further movement by another carrier.

At the interchange point, and before inspection and movement by CSXT, the butadiene leaked through a fissure in the bottom manway rubber gasket. The gas found an ignition source, and a flashback fire occurred at approximately 1:50 a.m. on September 9, 1987. The butadiene continued to leak from the tank, burning until the fire consumed it. About one thousand people were evacuated from the area, but there were no serious injuries. Before the fire went out, a class action was filed on behalf of all residents of New Orleans. Now there are approximately 8,000 claimants in this mass toxic-tort punitive-damage class action certified by the state court.

B. Plaintiffs' Claim for Punitive Damages.

Plaintiffs' claim against CSXT for state-law punitive damages rests solely on their allegation that CSXT's failure to inspect the Tank Car immediately and/or to receive the car from NOTC in person constitutes wanton and reckless conduct under article 2315.3 of the Louisiana Civil Code. At the time of the fire, article 2315.3 provided, in pertinent part:

> In addition to general and specific damages, exemplary damages may be awarded, *if it is proved that plaintiff's injuries were* caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances. . .

The Tank Car had been at the interchange point for less than seven hours when its butadiene lading ignited. Plaintiffs did not claim that CSXT actually knew that the Tank Car was leaking during that seven-hour period. Rather, Plaintiffs contended that CSXT should have known that the car was leaking before the fire since CSXT had an alleged duty to have an inspector present when the Tank Car arrived at the interchange point. Plaintiffs did not point to any federal regulation or law that required CSXT to have inspected the Tank Car during the seven-hour period before ignition.

There were no material facts in dispute regarding CSXT's actions or omissions in this matter. CSXT did not own, design, manufacture, or lease the Tank Car or any of its component parts. During the seven-hour period between its arrival at interchange and the ignition (7:25 p.m. through 1:50 a.m.), CSXT did not have any contact with the Tank Car or its butadiene lading. It is undisputed that CSXT had not inspected the Tank Car prior to the fire. While CSXT had received notice from NOTC that NOTC had placed the Tank Car on the interchange track, no CSXT employee saw or touched the Tank Car prior to the fire.

C. <u>CSXT's Preemption Motion</u>.

CSXT raised the issue of federal preemption in a motion for summary judgment to dismiss Plaintiffs' article 2315.3 claim

for punitive damages. The preemption motion was limited to the punitive-damage issue in accordance with the sequence for motion practice prescribed by the district court's case management order, which dictated the filing of motions related to punitive damages prior to dispositive motions.[4] CSXT's preemption argument addressed the question of what, if any, duty CSXT had to inspect the Tank Car before the fire, which would be dispositive of Plaintiffs' parallel claims against CSXT for compensatory damages.

CSXT's motion to dismiss the punitive-damage claim was based, *inter alia*, on express federal preemption under the Federal Railroad Safety Act (the "FRSA"), 45 U.S.C. § 434.[5] The U.S. Secretary of Transportation (the "Secretary") has promulgated federal rail-safety regulations that establish a 48-hour time limit within which a receiving common carrier must inspect and move a tank car arriving at interchange with "hazardous" lading. See 49 C.F.R. §§ 174.14(a), 174.8(b). CSXT thus argued that, pursuant to FRSA § 434, the federal regulations cover the

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[4]Amendment to Case Management Plan Order #10, Order Establishing Management Plan for Class Action Trial (1/23/95) at 2. The district court has not yet established a period for the filing of dispositive motions.

[5]The FRSA express preemption provision has been amended and relocated since the fire at issue. Pursuant to H.R. 1758, Public Law 103-272, § 1(e), July 5, 1994, 108 Stat. 866, 45 U.S.C. § 434 was repealed and recodified at 49 U.S.C. App. § 20106 (West 1996 Supp.). The legislative history confirms that the purpose of H.R. 1758 was merely "to restate in comprehensive form, without substantive change, certain general and permanent laws related to transportation and to relocate those laws [under Title 49 of the United States Code], and to make other technical improvements in the Code." H.R. Rep. 103-180, 103rd Cong., 1st Sess. 1993, 1993 WL 287624 (emphasis added).

time for inspection at interchange and thereby preempt the substantive basis for Plaintiffs' state-law claim for punitive damages.

D. The rulings below.

The district court rejected CSXT's preemption argument, ruling that 45 U.S.C. § 434, did not preempt the overall application of article 2315.3 to rail carriers. Pet. App. A8-A10. The district court, however, failed to address CSXT's narrow preemption argument -- that (1) federal law exclusively controls the legal question of what specific duties CSXT owed regarding the timeliness of an inspection of the Tank Car and that (2) federal law did not require CSXT to inspect the Tank Car immediately upon, or be present for, its arrival at the interchange.

On motion for reconsideration, the district court recognized that CSXT's failure to inspect the Tank Car and detect leaking, the exact basis of Plaintiffs' article 2315.3 claim, indeed had been found preempted by federal law in parallel federal-court proceedings arising out of the same fire. See Pet. App. B3 (citing *Galjour v. General American Tank Car*, No. 87-5003 (E.D. La. 12/12/91) (Pet. App. E3-E7)). The district court, however, denied reconsideration on the ground that other claims of simple negligence, unrelated to Plaintiffs' article 2315.3 claim for punitive damages, were not preempted. Pet. App. B4.

The appellate court granted CSXT's writ application and affirmed the district court's denial of summary judgment. Pet. App. C1-C19. Applying a "conflict" analysis, the appellate court affirmed the district court's ruling that the overall application of article 2315.3 to rail carriers was not preempted. Pet. App. C9. The court held that the Secretary's promulgation of penalties for FRSA violations did not preempt punitive damages under article

2315.3, because "the two provisions have different purposes." Pet. App. C9. However, like the district court, the appellate court failed to address whether the Secretary's regulations covering inspection at interchange preempt Plaintiffs' punitive-damage claim against CSXT.

The Supreme Court of Louisiana denied CSXT's application for review, stating that CSXT "may reraise the issue on appeal in the event of an adverse judgment." Pet. App. D1. CSXT now petitions this Court for a writ of certiorari on the issue of federal preemption.

REASONS FOR GRANTING THE WRIT

The appellate court's decision to affirm the denial of CSXT's motion for summary judgment on Plaintiffs' punitive-damage claim conflicts directly with this Court's relevant decision in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). Under *Easterwood*, a state-law tort claim is expressly preempted by the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 434, if the U.S. Secretary of Transportation (the "Secretary") has promulgated regulations covering the rail-safety matter raised by that tort claim. Plaintiffs' punitive-damage claim against CSXT is based solely on their allegation that CSXT breached an alleged duty to be present to immediately inspect the Tank Car upon its arrival at interchange. The Secretary has covered that rail-safety issue and established a 48-hour time limit within which a common carrier by rail must inspect and move tank cars through interchange. CSXT's conduct fell within the permissible range of conduct delineated by the Secretary's regulations; the fire having ignited less than 48 hours after the Tank Car arrived at interchange. Given that it did not breach its federal duty, CSXT should hardly be required to defend itself against a claim for

punitive damages. Plaintiffs' punitive-damage claim against CSXT thus is expressly preempted by the FRSA. The appellate court incorrectly applied a "conflict" analysis rather than the *Easterwood* "covering" analysis for FRSA express preemption. The appellate court's decision further conflicts with *Easterwood*, because the appellate court failed to consider whether the Secretary's regulations governing the time for inspecting tank cars at interchange (49 C.F.R. §§ 174.14(a) and 174.8(b)) cover the rail-safety matter raised by Plaintiffs' punitive-damage claim against CSXT.

Allowing the appellate court's decision to stand would have significant adverse impact on the way railroads interchange rail cars throughout the Nation's rail system. In lieu of adhering to the federal regulatory procedure for the interchange of rail cars, receiving carriers like CSXT would be required to receive cars in person and inspect them immediately. Allowing *ad hoc* applications of state law to determine the proper method for interchange of rail cars would disrupt the steady, uniform and predictable transportation of goods in and through interstate commerce provided by the federal regulations. CSXT should not be subjected to the onerous exposure of a punitive-damage claim where its conduct was indisputedly consistent with the preempting federal regulations covering the procedure for inspecting tank cars arriving at interchange.

A. The FRSA Expressly Preempts State Standards for Rail Safety.

The supremacy clause of the U.S. Constitution provides Congress with the power to preempt state law. "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2. Preemption may

be expressed or implied.[6] While preemption may be implied in certain circumstances,[7] state laws or standards regarding rail-safety matters are expressly preempted once the Secretary promulgates regulations covering that railway safety matter. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. at 662-63, 113 S.Ct. at 1736-37 (applying 45 U.S.C. § 434). The "express" preemption statute of FRSA § 434 "does not. . . call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted which in fact cover the subject matter. . ." that is raised by a plaintiff's claim. *Easterwood*, 507 U.S. at 675, 113 S.Ct. at 1743.

The FRSA contains the following express preemption provision:

> **§ 434. National uniformity of laws, rules, regulations, orders, and standards relating to railroad safety; State regulation**
> The Congress declares that laws, rules, regulations, orders and standards relating to railway safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railway safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating

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[6] *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977).

[7] See *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).

> to railway safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard and when not creating an undue burden on interstate commerce.[8]

Id. Thus, the FRSA expressly preempts state tort-law principles as to those subjects covered by federal law (as promulgated by the Secretary) pertaining to any facet of railway safety. *Easterwood*, 507 U.S. at 663-64, 113 S.Ct. at 1737-38.

The FRSA's express preemption provision is an example where "Congress [has] explicitly define[d] the extent to which it intends to preempt state law."[9] In doing so under § 434, Congress clearly manifested its unwillingness to provide the state any broader role, because Congress "d[id] not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial or administrative systems."[10] "[S]uch a vital part of our interstate commerce as railroads should not be subject

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[8]Plaintiffs have never alleged or even suggested that their article 2315.3 punitive-damage claim qualifies for the "local safety hazard" provision of § 434, which does not apply to any standards, such as tort laws, that have statewide application. See, e.g., *Easterwood*, 507 U.S. at 675, 113 S.Ct. at 1743; *National Association of Regulatory Utilities Comm'n v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976).

[9]*Michigan Canners & Freezers Association, Inc. v. Agricultural Marketing & Bargaining Board*, 467 U.S. 461, 469, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984).

[10]H.R. Rep. No. 1194, 91st. Cong., 2d Sess. 11, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4109 (emphasis added).

to [a] multiplicity of enforcement by various certifying States as well as the Federal Government."[11]

FRSA express preemption does not require a conflict between the federal and state law and is not dependent on the Secretary's purpose for enacting the federal regulation. This express declaration of congressional concern for national uniformity has caused the courts, in interpreting § 434, to strictly limit all forms of state regulation of rail safety. The FRSA authorizes only a "narrow spectrum of deviation from national uniformity." *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.) (attempts of Louisiana officials to obtain injunctive relief against allegedly unsafe practices of railroad preempted by FRSA), cert. denied, 414 U.S. 855, 38 L.Ed.2d 105 (1973).[12]

> The FRSA does not merely preempt those state laws which impair or are inconsistent with [federal] regulations. It preempts all state regulations aimed at the same safety concerns addressed by the [federal] regulations. . . .

Id.[13] See also *Easterwood*, 507 U.S. at 675, 113 S.Ct. at 1743. The sole basis of Plaintiffs' punitive-damage claim is whether CSXT had a duty to immediately inspect tank cars as they arrived at the interchange point. This is covered by the federal rail-safety regulations.

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[11]H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970).

[12]See also *Burlington Northern R.R. v. State of Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989) (Montana law requiring that occupied caboose on trains more than 2,000 feet in length held preempted by FRSA regulations).

[13](footnote omitted) (emphasis added).

B. The Secretary Has Adopted Regulations Covering the Sole Basis for Plaintiffs' Punitive-Damage Claim Against CSXT.

The Secretary has adopted detailed regulations covering the handling and inspection of tank cars carrying hazardous materials. See 49 C.F.R. §§ 170-179. These regulations are given express preemptive effect under § 434 of the FRSA. The Secretary clearly has adopted regulations that cover the only rail-safety matter raised by Plaintiffs' punitive-damage claim against CSXT: when and how a carrier must inspect tank cars arriving at interchange. See 49 C.F.R. §§ 174.8(b), 174.9(a)-(c), 174.12(a), (b), 174.14(a), 174.47(b), 215.5(c)(10), 215.203 and § 215, App. D. Plaintiffs thus cannot recover punitive damages based on state law.

Plaintiffs have never challenged CSXT's construction of the applicable federal rail-safety regulations. Under the federal rail-safety regulations, CSXT was required to inspect and to forward or reject the Tank Car within 48 hours after it arrived at the interchange point. See 49 C.F.R. §§ 174.14(a), 174.8(b). Section 174.14(a) provides:

> **§ 174.14 -- Movements to be Expedited.**
>
> (a) A carrier must forward each shipment of hazardous materials promptly and within 48 hours (Saturdays, Sundays, and holidays excluded), after acceptance at the originating point or receipt at any yard, transfer station, or interchange point, except that where biweekly or weekly service only is performed, a shipment of hazardous materials must be forwarded on the first available train.

49 C.F.R. § 174.14(a) (emphasis added). Under 49 C.F.R. § 174.8(b), CSXT was required to perform a defined and limited inspection of the car prior to moving it.[14] Section 174.8(b) provides:

> **§ 174.8 -- Inspection.**
>
> . . .
>
> (b) At any point where a train is required to be inspected, each loaded placarded rail car and each rail car immediately adjacent thereto must be inspected. The cars may continue in transit only when the inspection indicates that the cars are in a safe condition for transportation. (See §§ 174.9 and 174.10.) The inspection of a rail car other than a tank car or a rail car containing Class A explosives must include a visual inspection for obvious defects of the running gear and any leakage of contents from the car and to determine whether all required placards are in place and conform to the information given on the train consist or other shipping document as required by § 174.26(b).

49 C.F.R. § 174.8(b) (emphasis added). Indeed, the undisputed facts demonstrate that CSXT's conduct fell within the federal regulatory requirements covering inspection at interchange.

Together, §§ 174.14(a) and 174.8(b) of the federal rail-safety regulations establish the amount of time within which

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[14]It is undisputed that CSXT never moved or transported the Tank Car prior to the fire.

CSXT had to inspect and move the Tank Car. Plaintiffs cannot impose a shorter period (*i.e.*, within seven hours after arrival at interchange) through reliance on Louisiana tort-law standards. "[R]ail transportation of hazardous materials. . . is subject to extensive federal regulations and 'state' participation is strictly limited." *Consolidated Rail Corp. v. City of Bayonne*, 724 F.Supp. 320, 326 (D.N.J. 1989). "[T]he general operating, handling, loading and unloading of rail tank cars is specifically regulated in great detail under 49 C.F.R. § 174 et seq. (1988)." Id. Plaintiffs cannot use state law to recover punitive damages based on conduct that complies with the preempting federal regulations. See *Bayonne*, 724 F.Supp. at 336 (court applying, *inter alia*, 48-hour provision of 49 C.F.R. § 174.14(a) held that FRSA § 434 preempts state-law limitation on the number of butane rail cars permitted at interchange yard). "States are not permitted to 'establish Statewide standards [regarding rail safety] superimposed on national standards covering the same subject matter'" as the regulations.[15] None of the lower courts have suggested that federal law required CSXT to have completed the inspection of the Tank Car before that 48-hour period expired.

Express FRSA preemption entitled CSXT to summary judgment dismissing Plaintiffs' punitive-damage claim against it. Where, as here, there is no evidence showing that the railroad exceeded the applicable federal limit, the claim is preempted. *Mahony v. CSX Transportation, Inc.*, 966 F.2d 644 (11th Cir. 1992), reinstated *en banc*, 993 F.2d 211 (11th Cir. 1993). Plaintiffs cannot side-step federal law and argue for some state-law standard (*i.e.*, immediate inspection upon arrival) to support their punitive-damage claim. The Secretary has adopted regulations that cover the time for inspection at interchange. CSXT had 48

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[15]H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970).

hours to inspect and move the Tank Car. The appellate court's decision to affirm the denial of summary judgment thus constitutes legal error.

The federal court in parallel proceedings analyzed the exact preemption issue presented here and held that the FRSA preempted CSXT's alleged duty to inspect the Tank Car before the fire. See *Galjour v. General American Tank Car*, No. 87-5003 (E.D. La. 12/12/91) (Pet. App. E3-E7) (granting CSXT summary judgment on all remaining claims against CSXT for compensatory damages). In *Galjour*, the Eastern District of Louisiana dismissed state-law tort claims[16] against CSXT arising out of the same fire at issue here based on CSXT's failure to inspect, and to detect the leaking of, the Tank Car on preemption grounds. In doing so, the federal district court held:

> In accordance with 45 U.S.C. § 434, the Court examined each of the plaintiffs' claims to determine whether there are any federal regulations that were promulgated by the Secretary that cover the conduct in issue. The Secretary of Transportation has promulgated regulations governing interchange inspection of tank cars carrying hazardous materials for the purpose of determining that it is safe for

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[16]It should be noted that, in the federal *Galjour* proceeding, the claims for article 2315.3 exemplary damages against CSXT already had been dismissed (voluntarily as to *Galjour* plaintiffs and via summary judgment as to plaintiffs in the consolidated actions) at the time CSXT filed its preemption motion for summary judgment on the tort claims remaining against it for compensatory damages. The analysis as to what law governs and what inspection duties CSXT owed at interchange, however, is the same.

> transportation and is not leaking. See 49 C.F.R. § 174, 215.03, 215, Appendix D. Thus, the plaintiffs' state law negligence claims against CSXT based on failure to inspect and detect leaking. . . are preempted. See 45 U.S.C. § 434; Easterwood v. CSX Transportation, 933 F.2d 1548 (11th Cir. 1990).

Pet. App. E3-E4. *Galjour* correctly answered the preemption question that the appellate court failed to even address -- whether the Secretary has promulgated regulations covering the rail-safety matter raised by the Plaintiffs' state-law claim against CSXT. The appellate court, however, ignored *Galjour* and the preemption analysis required by FRSA § 434.

C. The Appellate Court's Decision Conflicts With *Easterwood*.

Proper application of the relevant decision of this Court, *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), requires dismissal of Plaintiffs' punitive-damage claim against CSXT. The appellate court's decision is at variance with *Easterwood* by ignoring the required "covering" preemption analysis under the FRSA and instead using a "conflict" analysis to reject federal preemption. At further variance with *Easterwood*, the appellate court failed to apply "covering" preemption to the rail-safety matter raised by Plaintiffs' punitive-damage claim against CSXT.

The appellate court erred in applying a "conflict" analysis for FRSA preemption. The court of appeal held that the FRSA civil penalty provisions did not preempt the overall application of article 2315.3 to rail carriers, "[b]ecause the fines and penal-

ties of the two provisions have different purposes." Pet. App. C9. In contrast, the relevant decision of this Court, *Easterwood*, requires a "covering" preemption analysis for FRSA express preemption, under which the Secretary's "purpose" for enacting a rail-safety regulation is irrelevant. Id., 507 U.S. at 675, 113 S.Ct. at 1743. Ignoring *Easterwood*, the relevant decision of this Court on FRSA preemption, the appellate court found the "reasoning" of the Louisiana First Circuit Court of Appeal's decision in *Haydel v. Hercules Transport, Inc.*,[17] "applicable to the FRSA." Pet. App. C9. In *Haydel*, the Louisiana First Circuit held that the penalty provisions of the Hazardous Materials Transportation Act ("HMTA"),[18] did not preempt application of article 2315.3 punitive damages.[19] Reliance on *Haydel* is clear error given that *Haydel* involved HMTA conflict preemption and not FRSA covering preemption. In contrast to the FRSA, the HMTA warrants preemption only where the state law or requirement is "substantively the same as" a federal HMTA provision or regulation. 49 U.S.C. § 5125(b)(1). *Easterwood*, however, confirms that the FRSA requires a "covering" preemption analysis. This appellate court's use of HMTA preemption analysis thus contradicts the express preemption of FRSA § 434, whereby "even consistent, supplemental state requirements" are invalid.[20]

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[17]94-1246 (La. App. 1 Cir. 4/7/95), 654 So. 2d 418, writ denied, 95-1172 (La. 6/23/95), 656 So. 2d 1019.

[18]49 U.S.C. § 5101, *et seq.*

[19]*Haydel*, 654 So.2d at 418.

[20]*Atchison, Topeka & Santa Fe Railway Co. v. Illinois Commerce Commission*, 453 F.Supp. 920, 925 (N.D. Ill. 1977) (federal rail-safety regulations addressing handling of particular shipments of hazardous materials placarded "poison gas" or "explosives A" preempted state regulations that had effect of requiring 130 additional commodities to be treated in same manner) (citing *Campbell v. Hussey*, 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961)).

The appellate court's decision further conflicts with *Easterwood*, because the court failed to recognize that the Secretary's regulations cover the rail-safety matter raised by Plaintiffs' punitive-damage claim against CSXT. The appellate court considered only whether the FRSA penalty provisions preempted Plaintiffs' punitive-damage claim. However, under *Easterwood*, the appellate court also was required to determine whether the Secretary's regulations cover the time for inspection of tank cars arriving at interchange. Indeed, the regulations governing the time for interchange inspection (49 C.F.R. §§ 174.14(a) and 174.8(b)) are not discussed or even mentioned in the appellate court's decision. The appellate court's failure to consider the preemptive effect of these regulations on Plaintiffs' punitive-damage claim against CSXT thus conflicts directly with this Court's relevant decision in *Easterwood*.

Easterwood arose from a crossing accident. In her state-law tort claim, Easterwood alleged, *inter alia*, that the accident was caused due to the train's "excessive speed." This Court held that the "excessive speed" allegation under state tort law was expressly preempted, because the train was travelling within the maximum speed limit established by federal regulation. Easterwood contended that her "excessive speed" claim was not preempted since the federal speed limit only provided a maximum train speed, and since the railroad breached a common-law tort duty to operate the train at a lower, safer speed near crossings. This Court, however, rejected that argument and held:

> On their face, the [federal regulations] address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate. Nevertheless, related safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track condi-

> tions were taken into account. Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort which respondent seeks to impose on [the railroad].

Easterwood, 507 U.S. at 674, 113 S.Ct. at 1742. Properly applied, *Easterwood* should prevent Plaintiffs from using state law to punish CSXT for not having inspected the Tank Car prior to expiration of the federal maximum timeframe.

The maximum 48-hour limit for inspection here is analogous to the maximum speed limit in *Easterwood*. Plaintiffs claim that CSXT was "wanton or reckless" for not inspecting the Tank Car the minute it arrived at interchange or within the seven-hour period before the fire. The Secretary, however, has covered that subject matter and has established a 48-hour time limit within which to inspect and move tank cars arriving at interchange. Thus, requiring CSXT to have inspected the Tank Car prior to the fire (*i.e.*, within seven hours after it arrived at interchange) would be the same as requiring the *Easterwood* train to travel below 7 m.p.h. in an area with a 48 m.p.h. federal speed limit. The *Easterwood* Court rejected that use of state law and held that state-law standards cannot be used to base a tort claim against a railroad whose conduct fell within the federally-imposed maximum or ceiling for that conduct. Id.

Plaintiffs have conceded that CSXT complied with its federal duties. In opposing summary judgment, Plaintiffs conceded that CSXT's obligation to inspect the Tank Car "under normal conditions might not have accrued within the prescribed [48-hour federal] limit." To avoid preemption, Plaintiffs sug-

gested below that CSXT's failure to take some action between the car's arrival at interchange and ignition was a failure to avoid a "specific, individual hazard." This argument was prompted by footnote 15 of the *Easterwood* decision where this Court stated that it was not deciding whether federal rail-safety regulations preempt an alleged "breach of related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard." *Easterwood*, 507 U.S. at 675 n. 15, 113 S.Ct. at 1743 n. 15 (emphasis added). Plaintiffs, however, failed to offer any evidence that the arrival of this Tank Car occurred under abnormal conditions or that CSXT was faced with a "specific, individual hazard." Indeed, none of the lower state courts have found that CSXT was faced with a "specific, individual hazard."

Plaintiffs claimed that the fact that the Tank Car carried a "hazardous" substance and that it was located in a "heavily populated" area constituted a "specific, individual" hazard obligating CSXT to have a person present to inspect the Tank Car immediately upon its arrival at interchange. Plaintiffs' argument, however, does not identify a "specific, individual hazard," instead it merely asserts that interchange of HAZMAT rail cars is dangerous. Indeed, despite footnote 15, *Easterwood* did decide that the tort claim was expressly preempted even though the plaintiff claimed that the train should have travelled at a slower speed through an allegedly dangerous crossing. Id., 507 U.S. at 675, 113 S.Ct. at 1743.

Courts interpreting footnote 15 have held that it addresses the situation where an engineer, although travelling within the federal authorized speed limit, observes a vehicle or person in its path. See, e.g., *Herriman v. Conrail, Inc.*, 883 F.Supp. 303, 307 (N.D. Ind. 1995). Proof that an area or a situation generally is dangerous is not sufficient to avoid *Easterwood* and FRSA preemption. *Easterwood*, 507 U.S. at 675, 113 S.Ct. at 1743. Accord *Herriman v. Conrail, Inc.*, 883

F.Supp. 303, 307 (N.D. Ind. 1995); *Armstrong v. Atchison, Topeka & Santa Fe Railway Co.*, 844 F.Supp. 1152, 1153 (W.D. Tex. 1994) (neither fog nor high vehicular traffic count at crossing is a "specific, individual hazard"). The "specific, individual hazard" under *Easterwood* thus logically relates to the avoidance of a "specific" accident and not avoidance of circumstances that are dangerous in general. *Herriman*, 883 F.Supp. at 307; *Armstrong*, 844 F.Supp. at 1153. By analogy, if a CSXT employee had observed leaking butadiene within the 48-hour period that employee, of course, could not ignore the leak for it clearly would be a "specific, individual hazard." But that did not happen.

Footnote 15 does not save Plaintiffs' punitive-damage claim against CSXT from FRSA preemption. Plaintiffs did not offer any evidence that CSXT here was presented with a "specific, individual hazard" and then failed to take action to avoid a specific accident. The presence and movement of tank cars carrying hazardous materials was and is a daily occurrence at this interchange point. There is no evidence that CSXT was aware that the Tank Car was leaking prior to the fire. Plaintiffs do not contend otherwise. The duty that Plaintiffs seek to impose for their state-law punitive-damage claim (to be present to immediately inspect all tank cars) thus is a generalized duty, which does not address a "specific, individual hazard." See *Herriman*, 883 F.Supp. at 307 (alleged breach of "generalized duty" of safety does not present an "individual hazard"). State-law negligence standards (i.e., that "reasonable persons must take greater care to avoid ultrahazardous situations") cannot be used as an exception to FRSA preemption, because "such an exception would swallow the FRSA's clear intent to pre-empt state law." *Easterwood*, 507 U.S. at 675, 113 S.Ct. at 1743. Accord *Bowman v. Norfolk Southern Railway Co.*, 832 F.Supp. 1014, 1018 (D.S.C. 1993), affirmed, 66 F.3d 315 (4th Cir. 1995) (table). The "specific, individual hazard" language does not create a negligence excep-

tion to FRSA express preemption. *Williams v. Alabama Great Southern Railroad Co.*, 1994 WL 419863 *3 (E.D. La. 1994).

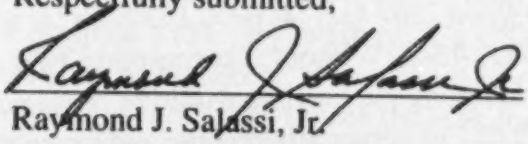
If accepted, Plaintiffs' contention would completely eviscerate the broad and express preemption required under FRSA § 434, make the regulations superfluous, and destroy the national uniformity Congress envisioned for achieving rail-safety. See *Easterwood*, 507 U.S. at 675, 113 S.Ct. at 1743; 45 U.S.C. §§ 421, 431, 434. Without a preemption finding, CSXT and all other receiving rail carriers would be required to stand guard 24 hours a day to personally receive and immediately inspect each of the thousands of rail cars that arrive at hundreds of interchange points throughout the national interstate rail system. The procedure for handling tank cars and the timeliness of inspecting them at interchange is covered by uniform federal regulations addressing those rail-safety matters. The Secretary has considered the related safety issues and promulgated regulations that allow tank cars carrying hazardous materials to sit on the tracks unattended at interchange for a prescribed period of time. Thus, the use of state-law standards to govern the time and manner for inspection at interchange is expressly preempted by FRSA § 434.

The appellate court's decision to deny FRSA preemption conflicts with *Easterwood*. The appellate court failed to determine whether the Secretary's regulations cover CSXT's inspection duty at interchange. The undisputed facts demonstrate that CSXT's conduct fell within the permissible limits of those regulations. Proper application *Easterwood* would require the appellate court to find Plaintiffs' punitive-damage claim against CSXT preempted by the FRSA.

CONCLUSION

This Court should grant this petition, reverse the denial of summary judgment, and order Plaintiffs' claim for punitive damages against Petitioner dismissed, with prejudice.

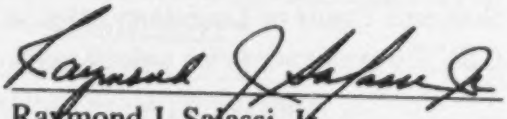
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Raymond J. Salassi, Jr., a member of the Bar of this Court, hereby certify that on September 24, 1996, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Henry T. Dart, Suite 301, 3748 N. Causeway Boulevard, Metairie, LA 70002, and Darleen Jacobs, 823 St. Louis Street, New Orleans, LA 70112, counsel for the respondents herein. I further certify that all parties required to be served have been served in accordance with this Court's rules.



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APPENDICES

A. District court's denial of CSXT's motion for summary judgment on exemplary-damage claim and reasons for same A1

B. District court's denial of reconsideration and reasons for same B1

C. Appellate court's affirmance of denial of summary judgment and concurring opinion C1

D. Supreme Court of Louisiana's denial of CSXT's application for writ of certiorari D1

E. *Galjour v. General American Tank Car*, No. 87-5003 (E.D. La.) -- 7/6/92 54(b) final Judgment and 12/12/91 order granting CSXT's Motion for Summary Judgment on Remaining Claims, *in globo* E1

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 87-16374 and all cases on attachment "A" DIVISION "B" DOCKET 4

IN RE: NEW ORLEANS TRAIN CAR LEAKAGE FIRE LITIGATION

JUDGMENT ON MOTIONS FOR SUMMARY JUDGMENT ON BEHALF OF ILLINOIS CENTRAL RAILROAD COMPANY, NEW ORLEANS TERMINAL COMPANY AND CSX TRANSPORTATION, INC. AS TO FEDERAL PREEMPTION FOR CLAIMS UNDER LCC ARTICLE 2315.3

The Motions for Summary Judgment filed on behalf Illinois Central Railroad Company, New Orleans Terminal Company and CSX Transportation, Inc., as to the Federal preemption for punitive damages under Article 2315.3 came on for hearing on June 16, 1995, and were taken under advisement.

Representation: **Darryl Foster, Esq.,** attorney for Illinois Central Railroad Company;
Ben Slater, III, Esq., attorney for New Orleans Terminal Company;
Harry Hardin, III, Esq., attorney for CSX Transportation, Inc.;
Henry Dart, Esq., David Robinson, Esq., Joseph Bruno, Esq., attorneys for Plaintiffs' Management Committee.

After considering the pleadings, the memoranda, argument of counsel and the law and for the written reasons assigned,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment herein dismissing the Motions for Summary Judgment on the basis that the claims for punitive damages under Civil Code Article 2315.3 are preempted by federal law.

New Orleans, Louisiana, this 19th day of July, 1995.

/s/ Robert A. Katz
JUDGE

REASONS FOR JUDGMENT

*1The Court assigns the following reasons for judgment:

This matter has been certified as a class action for damages arising out of a fire involving a tank car which occurred on September 9, 1987, in New Orleans, Louisiana.

The plaintiffs are seeking punitive damages under Civil Code Article 2315.3 on the basis that the fire arose from the storage/handling/transportation of hazardous materials combined with the wanton and reckless conduct of the various defendants.

The defendants Illinois Central Railroad Company, New Orleans Terminal Company and CSX now move for summary judgment on the basis that there is Federal preemption of any claims by the plaintiffs for punitive damages under Article 2315.3.

Before turning to the substance of the motions the Court must first address the procedural posture in which the issue is presented to the Court.

Under Rule 56(c) of the Federal Rules of Civil Procedure a district court may enter summary judgment if "the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

As the United States Supreme Court stated in Anderson v. Liberty Lobby, 477 U.S. 242, 249-50 (1986): "There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If

the (non-movant's) evidence is merely colorable, or is not significantly probative, summary judgment may be granted."

The United States Supreme Court in Celotex v. Catrett, 477 U.S. 317 (1986) also held that: One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose. . . Our conclusion is boasted by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *2sua sponte so long as the losing party was on notice that she (he) had to come forward with all of her evidence. . . Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. . . The entry of summary judgment, after adequate time for discovery and upon motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial (is appropriate)."

By comparison, Louisiana courts "have repeatedly held that a Motion for Summary Judgment is not a substitute for a trial on the merits," Fly v. Hand, 376 So 1016 (1 Cir. 1979); "The fact that little or no likelihood of successful prosecution or that a trial judge has grave doubt that a case can be proved by a preponderance of the evidence is not sufficient to sustain a Motion for Summary Judgment," Warden v. Southwest Hospital, 300 So 2d 590, 594 (3 Cir., 1974); "The interest of justice, at the risk of some delay and possible expense is best served by resolving all doubts against the granting of the Motion for Summary Judgment. It is not enough that the Court has grave doubt that the party alleging a cause can sustain his contention to deny him his

day in court," Smooth v. Ethyl Corp., 179 So 2d 650, 652 (4 Cir. 1965).

The Louisiana Supreme Court has crystallized the difference between state and federal practice in summary judgment procedure in the case of Sassone, et al v. Elder, et al 92-C-1856 (La. 1993) wherein in affirming this Court it stated: "The purpose of summary judgment in the federal system is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. In Louisiana, however, there is a strong preference for full trial on the merits in non-defamation cases."

Additionally, as a state court this Court is faced with the Louisiana jurisprudence that holds that Motions for Summary *3Judgment which attack theories of recovery, items of damage or address status issues without dismissing a party or granting all of the relief sought are improper and should be denied. See FNBJ v. Lloyd, 629 So 2d 507 (5 Cir., 1993); Williams v. Trapolin Law Firm, 641 So 2d 673, 676 (4 Cir. 1994); Palozzo v. Baker, 94 CA 1244 c/2 94 CA 1245 (4 Cir. 1995) writs denied, 95C 1264 (La., June 23, 1995) reversing this Court and Pape v. Odeco, 643 So 2d 229 (4 Cir. 1994) reversing this Court on the state issue and the Supreme Court decision in Everything on Wheels Subaru, Inc. v. Subaru South, Inc., 616 So 2d 1234 (La. 1993) as to Exceptions of No Cause of Action addressing two or more items of damages or theories of recovery.

Normally, this Court would be obligated to follow Louisiana jurisprudence and to dismiss the Motions for Summary Judgment outright. However, as a class action CCP Art. 5931.1 provides the Court with the flexibility to sever issues and try them separately. Hence, this Court does not see any impediment to addressing the issue of preemption on the Motions for Sum-

mary Judgment. Additionally, the Court feels that the federal policy of preemption would be frustrated were this Court to refer the issue of preemption to the time of trial.

The United States Court of Appeals, First Circuit in King v. Collagen Corp., 983 F 2d 1130 (1993) gives a very succinct overview to the doctrine of preemption:

> "Article VI of the Constitution dictates that federal law shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state notwithstanding... State laws that conflict with federal laws and regulations, therefore, are preempted. Malone v. White Motor Corp., 435 U.S. 497 (1978). In determining whether such a conflict exists, it is well settled that the intent of Congress governs. That is preemption does not occur unless Congress so intended. Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947),
>
> "Congress may express its intent to preempt state law explicitly in the language of the statute. (citations omitted) Congress may express its intent implicitly by passing an extensive statutory scheme that extensively covers the field of regulation. (citations omitted) Implied preemption also occurs when a conflict between state and federal law makes compliance with both state and federal law make compliance with both impossible, or when state law would frustrate the purpose and objectives of the federal law. (citations omitted)."

*4In the Collagen Corp. case the First Circuit examines the State Tort Law allegations of the plaintiff's petition in which she alleges strict liability, negligence, product misbranding, misrepresentation and failure to warn and fraud. In analyzing each of these allegations the Court concludes that the Food and Drug Administration regulations under the Capital Medical Device Amendments of 1976, 21 USC 360 c et seq., preempt all of the allegations and theories of recovery asserted by the plaintiff. Hence, the Court of Appeal affirms the granting of summary judgment in favor of the defendant by the United States District Court on a Motion for Summary Judgment.

Therefore, this Court concludes that the issue of preemption raised by the Motions for Summary Judgment on behalf of some of the defendants in the case sub judice should be addressed at this time.

Turning to the substance of the issue of preemption with respect to plaintiffs' allegations that the defendants are subject to punitive damages under 2315.3, the Court notes that there is a paucity of jurisprudence dealing with the Federal Railroad Safety Act- 45 USCA 434, et seq.- much less the issue of preemption vis-a-vis state tort law and regulations and exemplary damages.

In the only Supreme Court case dealing with the Federal Railroad Safety Act and the issue of preemption, CSX Transportation, Inc. v. Easterwood, 113 S.Ct. 1732 (1993), the majority opinion found that the two allegations of negligence as to the defendant- failure to maintain adequate warning devices at the crossing and operating the train at excessive speed- were preempted by the Federal Railroad Safety Act. The concurring opinion by Justices Thomas and Souter dissent from that of the majority opinion that found that these state-law tort claims were

preempted, concluding that in their opinion the Federal Safety Railroad Act did not preempt Eastwood's claims for negligence against CSX.

At first blush it would appear that the claims of the plaintiffs in the sub judice as to punitive and exemplary damages are preempted by the Federal Railroad Safety Act. *5However, footnote 15 to the majority opinion carves out a niche for state-tort law claims for excessive speed in order to "avoid a specific, individual hazard."

Neither the footnote nor the majority opinion articulate what would constitute a "specific, individual hazard" that would not be preempted by the Federal Railroad Safety Act.

In oral argument counsel for the defendants admitted that the FRSA would not grant immunity to a defendant were a train to be proceeding loftily down the railroad track and upon encountering a person tied to the tracks continue at its constant speed without making any attempt to stop. In other words, were the engineer to see a person tied to the tracks neither the engineer nor his employer would be immunized nor would the plaintiff's claims be preempted if there were time for the engineer to slow and stop the train rather than proceeding within the limits set by the secretary.

However, the Easterwood case does not address the issue of whether or not the FRSA preempts any state-tort law claims for punitive or exemplary damages.

The defendants in the case sub judice argue that exemplary damages are really penalties and that the FRSA provides for the secretary to impose administrate penalties for violation of the FRSA regulations. Ergo, they conclude that the regulatory

scheme providing for the imposition of penalties by the secretary preempts the ability of state law to impose exemplary or punitive damages in addition thereto.

There is no jurisprudence to support or controvert this position.

The defendants submit to the Court a decision by Judge Mentz involving a group of plaintiffs arising out of this same incident- Ga!jour v. General American Tank Corp., et al 769 F. Supp. 953 (USDC, E.D. La., 1991)- for the proposition that the defendants are not subject to punitive damages under LCC Art. 2315.3.

However, this decision did not deal with the issue of preemption.

*6Additionally, the Fourth Circuit decision in Canal Mortgage v. Jackson, 390 So 2d 1347 (4 Cir. 1980) stands for the proposition that a decision of lower federal courts are persuasive but not binding on state courts. See also Exchange National Bank of Chicago v. Spalitta, 321 So 2d 338 (La. 1975) at 342.

However, there are Louisiana Court decisions holding that punitive damages are permitted and not preempted by other federal regulatory acts- see Jordan v. Central Louisiana Telephone Company, 525 so 2d 1079 (3 Cir. 1980) which held that the Federal Employee Income Security Act of 1974, commonly known as ERISA did not preempt state law imposition of punitive damages; and the First Circuit decision in Haydel v. Hercules Transport, Inc., 94 CA 1246 (1 Cir., April 7, 1995) on writs to the Supreme Court at 95 C 1172.

Accordingly, the Court finds at this time that the Federal Railroad Safety Act does not preempt the imposition of state law

exemplary or punitive damages under Civil Code Article 2315.3.

For the foregoing reasons the Motions for Summary Judgment are denied.

New Orleans, Louisiana, this 19th day of July, 1995.

/s/ Robert A. Katz
JUDGE

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 87-16374 DIVISION "B" DOCKET 4
and all cases on
attachment "A"

IN RE: NEW ORLEANS TRAIN CAR LEAKAGE
FIRE LITIGATION

JUDGMENT ON MOTIONS FOR NEW TRIAL AND RECONSIDERATION ON BEHALF OF ILLINOIS CENTRAL RAILROAD COMPANY, NEW ORLEANS TERMINAL COMPANY AND CSX, TRANSPORTATION, INC. FROM THE SUMMARY JUDGMENT RENDERED AND JULY 19, 1995, AS TO FEDERAL PREEMPTION FOR CLAIMS UNDER LCC ARTICLE 2315.3

The Motions for New Trial and Reconsideration filed on behalf of Illinois Central Railroad Company, New Orleans Terminal Company and CSX, Transportation, Inc., from the summary judgment rendered herein on July 19, 1995, on the claims for federal preemption under LCC Article 2315.3 came on for hearing on October 27, 1995, and were taken under advisement.

Representation: **Harry Hardin, III, Esq.,** attorney for CSX Transportation, Inc.;

David Kelly, Esq., and Darryl Foster, Esq., attorney for Illinois Central Railroad Company;

Mark Van Horn , Esq., and Benjamin Slater, III, Esq., attorney for New Orleans Terminal Company;

Henry Dart, Esq., Joseph Bruno, Esq., attorneys for Plaintiffs' Management Committee.

After considering the pleadings, the memoranda, argument of counsel and the law and for the written reasons assigned,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment herein denying the Motions for New Trial and Reconsideration of the Summary Judgment rendered herein on July 19, 1995, dismissing the Motions for Summary Judgment on the basis that the claims for punitive damages under Civil Code Article 2315.3 are not preempted by Federal Law.

New Orleans, Louisiana, this 30th day of November, 1995.

/s/ Robert A. Katz
JUDGE

REASONS FOR JUDGMENT ON MOTIONS FOR NEW TRIAL AND RECONSIDERATION AS TO FEDERAL PREEMPTION FOR CLAIMS UNDER LCC ARTICLE 2315.3

*1On July 19, 1995, the Court dismissed the Motions for Summary Judgment filed by CSX, Illinois Central and New Orleans Terminal seeking dismissal of the claims against them for punitive damages under Civil Code Article 2315.3 on the basis that these claims were preempted by federal law.

The movers now seek to have this Court reconsider its denial of summary judgment.

The Court at the outset acknowledges its error for the statement in the original "Reasons for Judgment" that Judge Mentz "did not deal with the issue of preemption." This error was the result of not realizing that the summary judgments granted by Judge Mentz on June 27, 1991, and July 15, 1991, and reported at 769 F. Supp. 953 did not include the dismissal of claims due to federal preemption. Rather, Judge Mentz not by summary judgment but by minute entry on December 12, 1991, dismissed the claims against CSXT as a result of federal preemption and this minute entry is not reported in the Federal Supplement.

In reviewing the minute entry by Judge Mentz it is correct that he stated: "The plaintiffs' state law negligence claims against CSXT based on failure to inspect and detect leaking... are preempted."

Nevertheless, the Court does not find that this inadvertence is a basis for reversing the prior denial of summary judgment.

Judge Mentz in his minute entry at page 2 summarized the plaintiffs' negligence claims against CSX Transportation as follows: "Failure to prevent or minimize the leakage, explosion, and fire; delivering and spotting the car in a heavily populated area; and failing to take appropriate action to remove the tank car from the heavily populated area after notice of imminent danger, are not preempted because the secretary has not promulgated regulations covering these subjects. The claims must nevertheless fail because the plaintiffs have submitted no evidence to support these claims."

*2As noted in the original "Reasons for Judgment" in the denial of summary judgment, the Court emphasized that the procedure for summary judgment in Federal Court is vastly different from that in State Court. Under state procedure the burden is on the mover for a summary judgment to show the absence of a genuine issue of material fact. The Court concluded in its original judgment and now concludes on this Motion for Reconsideration that the movers have not carried their burden of showing that there is an absence of genuine issue of material fact as to the plaintiffs' allegations.

Hence, the Motion for Reconsideration is denied.

New Orleans, Louisiana, this 30th day of November, 1995.

/s/ Robert A. Katz
JUDGE

Copr. (C) West 1996 No claim to orig. U.S. govt. works
671 So.2d 540
(Cite as: 95-2710 (La.App. 4 Cir. 3/20/96), 671 So.2d 540)

In re NEW ORLEANS TRAIN CAR LEAKAGE FIRE LITIGATION.

Nos. 95-C-2710, 95-C-2721, 95-C-2734, 95-C-2797, 95-C-2811,96-C-0015, 96-C-0016 and 96-C-0017.
Court of Appeal of Louisiana,
Fourth Circuit.
March 20, 1996.
Rehearing Denied April 24, 1996.
Writ Denied June 28, 1996.

**542 On Certiorari Civil District Court, for the Parish of Orleans No. 87- 16374, Division "B"; Honorable Robert A. Katz, Judge.

Raymond J. Salassi, Jr., Harry S. Hardin, III, Judith V. Windhorst, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P., New Orleans, for CSX Transportation, Inc.

Henry T. Dart, Metairie, for Plaintiffs' Management Committee.

David S. Kelly, Darryl J. Foster, Lemle & Kelleher, New Orleans, for Illinois Central Railroad Company.

Eric Shuman, McGlinchey Stafford Lang, New Orleans, for Novacor Chemicals Inc. and Polysar, Ltd.

**543 George J. Richaud, Young, Richaud & Myers, New Orleans, for Mitsui & Company (U.S.A.), Inc.

Charles M. Steen, Mark C. Dodart, Kyle J. Brackin, Phelps Dunbar, L.L.P., New Orleans, for General American Transportation Corporation.

Daniel Lund, Timothy F. Daniels, Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P., New Orleans, for AMF-BRD, Inc.

Benj. R. Slater, Jr., Benj. R. Slater, III, Mark E. Van Horn, Donald J. Miester, Jr., Slater Law Firm, New Orleans, for New Orleans Terminal Company.

James G. Burke, Jr., Wm. Daniel Wellons, Rebecca A. Fariss, Burke & Mayer, New Orleans, for Phillips Petroleum Company and Phillips 66 Company.

Before BYRNES, LOBRANO and PLOTKIN, JJ.

*1 PLOTKIN, Judge.

The instant consolidated writ applications were filed by eight individual defendants in a class action suit arising from a September 9, 1987 incident in a heavily-populated area of New Orleans East involving an explosion and fire caused by a leaking railroad tank car containing butadiene. The defendants seek review of two trial court judgments denying motions for summary judgment concerning the claims asserted by the class action plaintiffs under the provisions of La.C.C. 2315.3, relative to exemplary damages for "wanton and reckless disregard for public safety in the storage, handling or transportation of hazardous or toxic substances," other than electricity. Three of the defendants who filed writ applications claim that the La.C.C. art. 2315.3 claims are preempted by federal law. All eight of the defendants claim that they cannot be liable under La.C.C. art. 2315.3 because of "status" issues; in other words, the defendants

claim that the evidence presented in the trial on the motion for summary judgment establishes that they are entitled to judgment as a matter of law because it shows that they were not involved in the "storage, handling or transportation" of the butadiene at the time of the accident, as required for liability under La.C.C. 2315.3. We granted certiorari on all issues.

*2 Facts

The plaintiffs allege that the leak and resultant fire in the instant case was caused by a defective or improperly-installed gasket on the tank car in question. The tank car started leaking butadiene, which was eventually ignited by an outside source, possibly a pilot light on an external water heater, plaintiffs claim. The Plaintiff Management Committee for the class action plaintiffs included the following entities as defendants: CSX Transportation [hereinafter "CSX"]; Illinois Central Railroad Co. ["Illinois Central"]; Novacor Chemicals, Inc. (formerly Polysar, Ltd.) and Polysar, Ltd. [hereinafter "Polysar"]; General American Transportation Corp. [hereinafter "GATC"]; Mitsui and Co. (U.S.A.), Inc. [hereinafter "Mitsui"]; AMF-BRD, Inc. [hereinafter "AMF-BRD"]; New Orleans Terminal Company [hereinafter "NOTC"]; and Phillips Petroleum Co. and Phillips 66 Co. [hereinafter "Phillips"]. The activities allegedly performed by each of these defendants in relation to the tank car are summarized below.

AMF-BRD: The tank portion of the tank car involved in the fire was manufactured by AMF-BRD in 1966, and the tank car was assembled by North American Car Corporation (now defunct), also in 1966. North American sold the tank car to Phillips in September of 1979.

Phillips: While in the possession of Phillips, the tank car underwent maintenance involving the allegedly-defective gas-

ket on three different occasions. In November of 1981, Phillips installed an asbestos gasket in the tank's bottom manway closure. During repair and maintenance in November of 1984, Phillips replaced the asbestos gasket with a rubber gasket. In November of 1986, the tank car again underwent maintenance work. On this third occasion, the rubber gasket in the bottom manway closure was removed. The same gasket was reinstalled, using a silicone sealant to insure a proper fit. Phillips sold the tank car to GATC in December of 1986 "as is, where is."

****544** GATC: At the time of the accident, GATC owned the tank car in question. In February of 1987, GATC leased the tank car to Mitsui.

Mitsui: In September of 1987, Mitsui loaned the tank car to Polysar as a "business favor." The tank car was to be used to transport a shipment of butadiene from Goodhope, Louisiana, to Chattanooga, Tennessee.

***3** Polysar: At Polysar's request, Mitsui arranged with GATX Terminals, Inc. [hereinafter "GATX"] for the offloading of 154,530 pounds of butadiene from the M/V Herman Schulte into the tank car at GATX's terminal facilities at Goodhope. The butadiene, which was purchased by Polysar overseas, was loaded into the tank car on September 4, 1987.

Illinois Central: After the tank car was loaded, it was transferred to Illinois Central, which transported the tank car to Jefferson Parish where it was turned over to New Orleans Terminal Company.

NOTC: NOTC delivered the tank car to CSX's interchange track in New Orleans at approximately 7:25 p.m. on September 8, 1987. At that time, the bills of lading on the tank

car were allegedly placed in CXS's waybox. NOTC had notified CSX at approximately 6:30 p.m. that the tank car would be delivered shortly.

CSX: The tank car had not been inspected or accepted by CSX when the explosion and fire occurred at approximately 1:50 a.m. on September 9, 1987. The fire was not completely extinguished until 1:55 p.m. on September 10, 1987.

All defendants sought summary judgment on the exemplary damages issue. NOTC, Illinois Central, and CSX argued that federal regulations promulgated by the Department of Transportation preempt the application of the Louisiana code article. All eight defendants claim they do not qualify for liability under La.C.C. art. 2315.3 because of "status" issues.

The trial court denied all of the motions for summary judgment on July 19, 1995. Defendants filed motions for reconsideration and motions for new trial, which were also denied, on November 30, 1995. All eight defendants sought this court's supervisory jurisdiction.

Federal pre-emption

[1] First, Illinois Central, NOTC, and CSX claim that they have no liability under La.C.C. art. 2315.3 because the effects of the codal article are preempted by the Federal Railroad Safety Act, 45 U.S.C. ss 421-447 [hereinafter "FRSA"]. 45 U.S.C. s 434, relative to the preemptive effect of the Federal Railroad Safety Act, provides as follows: The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force *4 any law, rule, regulation, order, or standard, relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order

or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

[2][3] The pre-emption doctrine has its roots in the Supremacy Clause of the U.S. Const. art. VI, cl. 2, which invalidates state laws that "interfere with, or are contrary to" federal law. See Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714, 720-721 (1985). Basic to this constitutional command is the notion that all state provisions which conflict with federal law are without effect. Maryland v. Louisiana, 451 U.S. 725, 747, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576, 596 (1981). Pre-emption may be either express or implied and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-153, ****545** 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664, 674-675 (1982).

[4][5] Therefore, when a state statute conflicts with or frustrates federal law, the former is preempted and can have no effect. U.S. Const., Art. VI, cl. 2; Maryland, 451 U.S. at 747, 101 S.Ct. at 2129, 68 L.Ed.2d at 596. In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law should be reluctant to find pre-emption. Evidence of preemptive purpose is sought in the text and structure of the statute at issue. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95, 103 S.Ct. 2890, 2898, 77 L.Ed.2d 490,

499-500 (1983). If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent. CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 662-664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387, 395-396 (1993).

Relative specifically to the preemptive effect of the FRSA, the United States Supreme Court held in the CSX Transportation, Inc. case that the federal regulations which set the *5 maximum operating speeds for all freight and passenger trains preempted the plaintiff's claim that the defendant's train was travelling at an excessive rate of speed. The facts of the case revealed that the train was travelling under the maximum speed when the accident occurred. In footnote 15 of the opinion, the Court recognized that the "preemption of respondent's excessive speed claim does not bar suit for breach of related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard." CSX Transportation, Inc., 507 U.S. at 675, 113 S.Ct. at 1743.

The Louisiana First Circuit Court of Appeal in Haydel v. Hercules Transport, Inc., 94-1246 (La.App. 1 Cir. 4/7/95), 654 So.2d 418, writ denied, 95-1172 (La. 6/23/95), 656 So.2d 1019, considered a very similar issue to the one presented by this case. In Haydel, the court concluded that application of La.C.C. article 2315.3 was not preempted by the Hazardous Materials Transportation Act, 49 U.S.C. s 5101 et seq. [FN1] [hereinafter "HMTA"]. In concluding that the statute was not preempted by the HMTA, the court noted that the purpose of the HMTA was "to provide adequate protection against the risks of life and property inherent in the transportation of hazardous material in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation." 49 U.S.C. s 5101.

FN1. The HMTA is a law relating to railroad safety and s 434 of the FRSA applies to the HMTA as it relates to the transportation of hazardous material by rail. CSX Transportation, Inc. v. Public Utilities Commission of Ohio, 901 F.2d 497, 501 (6th Cir.1990), cert. denied, Public Utilities Commission of Ohio v. CSX Transportation, Inc., 498 U.S. 1066, 111 S.Ct. 781, 112 L.Ed.2d 845 (1991).

The preemptive effect of the HMTA is set forth at 49 U.S.C. s 5125(b)(1) as follows: Except as provided in subsection (c) of this section, a law, regulation, order, or other requirement of a State ... about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter, is preempted:

. . . . .

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous materials.

The HMTA also provides a civil penalty to be assessed for violations of any of the provisions of the act. 49 U.S.C. s 5123 states that "[a] person who knowingly violates this chapter or a regulation prescribed or order issued under this chapter is liable to the United States Government for a civil penalty of at least $250 but not more than $25,000 for each violation." ***6** The defendants in Haydel contended that the statute preempted the effect of La.C.C. art. 2315.3 because the Louisiana law was not substantially the same as the federal provision; the First Circuit disagreed with the defendants. The court concluded that the statutes addressed separate and distinct issues, stating as follows: However, LSA-C.C. art. 2315.3 merely sets forth a cause of action for exemplary ****546** damages in favor of an individual person who is injured due to a defendant's wanton or reckless disregard for public safety while engaged in the storage, han-

dling, or transportation of hazardous materials, which are defined by federal law. Therefore, while the Louisiana state provision is substantively different from the federal provision, the federal and state statutes address totally separate and distinct subject matters. Further, the federal penalty provision (49 U.S.C. s 5123) does not provide a remedy for individual persons injured as a result of the handling of hazardous materials; it authorizes the imposition of a fine to be paid to the federal government in the event that a person knowingly violates the HMTA. Conversely, the provisions of LSA-C.C. art. 2315.3 operate in favor of the individual damaged by the careless disregard in the handling of hazardous materials, but do not impose any sort of civil penalty in favor of any governmental body. Haydel, 654 So.2d at 418.

We find the reasoning of the Haydel case applicable to the FRSA, as well as to the HMTA--the FRSA does not preempt the provisions of La.C.C. art. 2315.3. Like the HMTA, the penalty provisions of the FRSA provide for fines and penalties to be paid to the federal government, not to the individual persons injured as a result of the improper storage, handling, or transportation of hazardous materials. Because the fines and penalties of the two provisions have different purposes, we hold that the FRSA does not preempt La.C.C. art. 2315.3.

Moreover, this conclusion is not inconsistent with the Louisiana Supreme Court's statements in Billiot v. B.P. Oil Co., 93-1118 (La. 9/29/94), 645 So.2d 604, that one of the three-fold purposes of La.C.C. art. 2315.3 is "to provide victims injured by such conduct with the incentive to act as the prosecutors of penal laws against such wrongdoers." Id. at 613. The fact that the Supreme Court observed in that case that "the purpose of the duty and the penalty [of La.C.C. art. 2315.3] are not to compensate the victim but to protect the public from risks of harm from toxic and hazardous substances by punishing and deterring violations of

that duty to the public" does not mean that the statute is pre-empted by the FRSA, a question not even alluded to in Billiot.

*7 Accordingly, we find that the trial court properly denied the motions for summary judgment based on federal pre-emption filed by Illinois Central, NOTC, and CSX. That judgment is hereby affirmed.

Status issues

By the second judgment at issue in the instant consolidated supervisory writ applications, the trial court denied motions for summary judgment filed by all eight individual defendants, in which they each claim that they cannot be found liable under La.C.C. art. 2315.3 because they were not engaged in "storage, handling, or transportation" the butadiene at the time of the explosion and resulting fire.

La.C.C. art. 2315.3 provides as follows: In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances. As used in this Article, the term hazardous or toxic substance shall not include electricity.

[6][7] Obviously, La.C.C. art. 2315.3 does not require the victim's injury to have been caused by the exposure to a toxic substance; the victim must show only that the injuries were caused by the defendant's reckless conduct in handling a hazardous or toxic substance. Tillman v. CSX Transportation Co., 617 So.2d 46 (La.App. 4th Cir.1993), writ denied, 625 So.2d 172 (La.1993). See also Billiot, 645 So.2d at 620 (on rehearing). Moreover, "[i]mplicit in storing, handling or transporting is the requirement that the hazardous substance be in the possession or

control of a person who then handles or otherwise deals with that substance." Wiltz v. Mobil Oil Exploration and Producing, N.A., Inc., 702 F.Supp. 607, 608 (W.D.La.1989). However, no requirement that the defendant be in possession and control of the hazardous substance at the time of plaintiff's injury exists. King v. E.I. DuPont De Nemours, **547 850 F.Supp. 503 (W.D.La.1994). The statute, since it imposes a penalty, must be strictly construed. Chustz v. J.B. Hunt Transport, Inc., 95-0356 (La. 11/6/95), 662 So.2d 450.

None of the defendants claim that butadiene is not a hazardous or toxic substance under the provisions of La.C.C. art. 2315.3. Rather each of the defendants claims that the evidence *8 presented on the trial of the motion for summary judgment is sufficient to prove that it cannot be liable under the article because it was not involved in the storage, handling, or transportation of the butadiene at the time the explosion and fire occurred.

The trial court judgment denying the motions or summary judgment on the status issues is based almost exclusively on Tillman, 617 So.2d 46. In that case, this court held that a truck driver injured in a collision with a train which was carrying hazardous substances had a cause of action under La.C.C. art. 2315.3, even though his injuries were not caused by the hazardous materials themselves. The reasoning of that case does not apply to the instant case, where the injuries unquestionably were caused by the hazardous substances being transported. The result in Tillman is based on the causation issue, not the status issue presented by this case. The status of the defendant as an entity which was involved in the storage, handling, or transportation of a hazardous substance at the time of the accident in Tillman was uncontested.

The actions of each of the individual entities filing motions for summary judgment are summarized below.

[8] AMF-BRD: AMF-BRD's only involvement with the tank car was as manufacturer of the tank. Certainly, the plaintiffs make no allegations that AMF-BRD, Inc. had possession or control over the tank car at the time or after the time it was loaded with the butadiene. In fact, the uncontested record evidence shows that AMF-BRD has had no connection with the tank car since 1966. Thus, there is no evidence indicating that AMF-BRD was ever involved in storage, handling, or transportation of the butadiene in the instant case.

Accordingly, the trial court erred in denying AMF-BRD's motion for summary judgment. As the defendant was not involved in the storage, handling or transportation of the butadiene, it cannot be liable for exemplary damages under La.C.C. art. 2315.3. The trial court judgment denying AMF-BRD's motion for summary judgment is therefore reversed; AMF-BRD's motion for summary judgment on the issue of exemplary damages under La.C.C. art. 2315.3 is granted.

[9] Phillips: Phillips also argues that it was not involved in the storage, handling or transportation of the butadiene. Phillips purchased the tank car from North American in September of 1979. During the time it owned the tank car, Phillips performed maintenance *9 repairs on three occasions, the last time in November of 1986. The tank car was then sold to GATC in December of 1986. Thus, Phillips had no involvement in the loading and transporting of the butadiene in the tank car in September of 1987.

The jurisprudence interpreting La.C.C. art. 2315.3 requires a finding that the defendant have some possession or control over the hazardous substance prior to the victim's inju-

ries. Because Phillips never had possession or control over the butadiene in the instant case, Phillips was not involved in the "storage, handling, or transportation" of the hazardous substance and cannot be held liable for exemplary damages under C.C. art. 2315.3. It is true that all of the maintenance procedures performed on the tank car involved the gasket which the plaintiffs allege was defective; however, that fact does not bring Phillips under the ambit of La.C.C. art. 2315.3. Accordingly, the trial court erred in denying Phillips' motion for summary judgment on the exemplary damages issue. The trial court judgment is reversed, and the motion for summary judgment on the issue of exemplary damages in favor of Phillips is granted.

[10] GATC: GATC was the owner of the tank car, having purchased the tank car from Phillips "as is, where is" in December of 1986. GATC then leased the tank car to Mitsui in February of 1987, and had no contact with the tank car after that date. Further, **548 GATC had no connection with the butadiene cargo the tank was carrying and therefore was not involved in the actual storage, handling, or transportation of the butadiene. Under La.C.C. art. 2315.3 and the interpretive jurisprudence, GATC cannot be liable for exemplary damages and the trial court erred in denying General American's motion for summary judgment on the exemplary damages issue. The trial court judgment is reversed; General American's motion for summary judgment on the issue of exemplary damages is hereby granted.

[11] Mitsui: Mitsui leased the tank car from GATC in February of 1987 and allowed Polysar to use it to transport the butadiene in November of 1987 as a "business favor." Mitsui claims that it had nothing to do with the loading or transportation of the butadiene. However, Polysar claims it contracted with and relied upon Mitsui to perform all the steps necessary to transfer the cargo from the ship at Goodhope to its plant in Chattanooga.

The bill of lading named Mitsui as shipper.

*10 Mitsui denies Polysar's allegations that it was responsible for the shipment of the butadiene, and claims that it simply assisted Polysar in obtaining transportation for the shipment of butadiene. The chemical was directly offloaded from the ship to the tank car by employees of GATX Terminals, who had previously loaded tank cars on lease to Mitsui with butadiene owned by Mitsui. Mitsui claims it simply asked GATX to offload the butadiene on Polysar's request. Concerning the bill of lading, Mitsui claims it simply used a pre-printed form, and that Mitsui's name should have been crossed out and replaced with Polysar's name.

As indicated by these facts, a material issue concerning who had control over the shipping of the butadiene exists, making summary judgment inappropriate. Mitsui contends that Polysar had control over the entire operation; Polysar alleges that Mitsui had responsibility for handling the entire matter. In light of these conflicting contentions, the trial court judgment denying Mitsui's motion for summary judgment on the issue of exemplary damages is correct. The difference between Mitsui and the defendants discussed above is that Mitsui may have been involved in a series of events related to the transportation of this particular load of butadiene, while the above defendants never had any connection with the transportation of this butadiene but only had a past relationship with the tank car. If Polysar proves at trial that Mitsui was responsible for the shipping, and if the plaintiffs prove that Mitsui performed its duties related to the shipping in a wanton and reckless manner, Mitsui could be subject to La.C.C. art. 2315.3 exemplary damages. The denial motion for summary judgment on the exemplary damage issue filed by Mitsui is hereby affirmed.

[12] Polysar: Polysar owned the butadiene in question, having purchased it overseas. However, Polysar claims that it was not involved in "storage, handling, or transportation" of the butadiene at the time of the explosion and resulting fire. In support of this argument, Polysar claims that it contracted with Mitsui to handle shipping of the butadiene.

As noted above, genuine issues of material fact making summary judgment inappropriate exist concerning the party having responsibility for the shipping of the butadiene. Like Mitsui, the record indicates that Polysar could have some liability for La.C.C. art. 2315.3 exemplary damages, if Mitsui proves that it was responsible for the shipping, and the plaintiffs prove that Polysar performed its duties related to the shipping in a wanton and reckless manner. Under *11 those circumstances, Polysar would have been involved in a series of events related to the transportation of this particular load of butadiene. Accordingly, the trial court judgment denying the motion for summary judgment on the issue of La.C.C. art. 2315.3 exemplary damages filed by Polysar is correct. That judgment is affirmed.

[13] Illinois Central: After the tank car was loaded by GATX employees, it was transferred to Illinois Central, which transported the tank car from the GATX facility in Goodhope to Jefferson Parish, where it turned the car over to NOTC. Despite the fact that it was unquestionably involved in **549 storage, handling, or transportation of the butadiene, Illinois Central claims that it could not be liable under La.C.C. art. 2315.3 for two reasons: (1) undisputed evidence indicates that it conducted multiple inspections; and (2) it delivered the tank car to NOTC more than 48 hours prior to the time the tank car started leaking, according to the plaintiffs' allegations. Because it had no involvement with the tank car at the time of the explosion and fire, Illinois Central claims that La.C.C. art. 2315.3 has no application on its face.

[14] We disagree with this interpretation of La.C.C. art. 2315.3. Nothing in the express language of the statute requires a finding that a person or entity be physically involved with the hazardous substance at the time the incident occurs as a prerequisite to liability. Without question Illinois Central was involved in the series of events related to the transportation of this particular load of butadiene, and therefore could be held liable under for La.C.C. art. 2315.3 exemplary damages, if the plaintiffs can prove that it performed its duties in a wanton and reckless manner. Thus, a genuine issue of material fact concerning Illinois Central's liability under La.C.C. art. 2315.3 exists, making summary judgment inappropriate. The trial court judgment denying the motion for summary judgment filed by Illinois Central is correct; it is hereby affirmed.

NOTC: NOTC received the tank car from Illinois Central and delivered it to the CSX interchange in New Orleans East where the explosion and fire occurred at approximately 7:25 p.m. September 8, 1987, some seven hours prior to the time the explosion occurred. NOTC claims that it placed the bills of lading for the tank car in CSX's waybox at that time. Moreover, NOTC had notified CSX at approximately 6:30 p.m. that day that the tank car was *12 to be delivered shortly. NOTC, like Illinois Central, claims that it could not be liable under La.C.C. art. 2315.3 because it was not involved in the storage, handling, or transportation of the butadiene at the exact time of the explosion. The same analysis as applied to Illinois Central also applies to NOTC--the statute does not require that a liable party be involved with the hazardous substance at the time of the incident causing damage. NOTC, like Illinois Central, was involved in the series of events related to the transportation of this particular load of butadiene, and therefore could be held liable under for La.C.C. art. 2315.3 exemplary damages, if the plaintiffs can prove that it performed its duties in a wanton and reckless manner. Accordingly, genuine issues of material fact concerning NOTC's liabil-

ity remain, and the trial court properly denied the motion for summary judgment on the issue of exemplary damages filed by NOTC.

[15] Moreover, the record indicates that NOTC's possible liability under La.C.C. art. 2315.3 may not hinge solely on its role as of transporter of the butadiene; NOTC may also be vicariously liable for the negligence of its employees in failing to notify their supervisor or CSX of odors emanating from the area of the tank car prior to the explosion. At approximately 10:30 p.m., Ronald Williams, an NOTC engineer, while in the CSX yard, detected an unusual odor, which he dismissed as a dead animal. Ernest Thibodeaux, another NOTC employee, also noted the odor, which he said resembled butadiene, but told no one. During the depositions of these men, the plaintiffs attempted to discover the extent of training the company gave their employees concerning the transportation of hazardous materials. Plaintiffs could therefore be awarded exemplary damages against NOTC on the basis of the fact that the actions of its employees of were wanton and reckless. For that reason also, the trial court judgment denying the motion for summary judgment is correct. That judgment is hereby affirmed.

CSX: NOTC transported the tank car to the CSX interchange in New Orleans East at approximately 7:25 p.m. on September 8, 1987. The car was sitting at that interchange, which is located in a heavily-populated area, when the explosion and fire occurred. Nevertheless, CSX claims that it cannot be liable for exemplary damages under La.C.C. art. 2315.3 because it had not inspected or accepted the tank car prior to the incident and because it was not involved ****550** in the storage, handling, or transportation of the butadiene at the time of the explosion. On the ***13** other hand, NOTC claims that the bills of lading had been placed in CSX's waybox when the tank car was delivered to the CSX exchange approximately seven hours prior to the explosion

and fire which caused the damages in the instant case. That action, NOTC indicates, transferred custody of the tank car to CSX.

As noted above in the discussions concerning Illinois Central and NOTC, La.C.C. art. 2315.3 does not require that the defendant be actively involved in the storage, handling, or transportation of the substance at the time of the incident. CSX, like Illinois Central and NOTC, was involved in the series of events related to the transportation of this particular load of butadiene, and therefore could be held liable under for La.C.C. art. 2315.3 exemplary damages, if the plaintiffs can prove that it performed its duties in a wanton and reckless manner. Accordingly, the trial court judgment denying the motion for summary judgment on the issue of exemplary damages in favor of CSX is correct; it is hereby affirmed.

Conclusion

For the foregoing reasons, the trial court judgment denying the motions for summary judgment filed by Illinois Central, NOTC, and CSX based on federal pre- emption are affirmed. Moreover, the trial court judgment denying the motions for summary judgment filed by Mitsui, Polysar, Illinois Central, NOTC, and CSX based on the status issues are affirmed. However, the trial court judgment denying the motions for summary judgment filed by AMF-BRD, Phillips, and GATC based on the status issues are reversed. Summary judgment on the exemplary damages issues under La.C.C. art. 2315.3 is granted in favor of AMF-BRD, Phillips, and GATC. The case is remanded for further proceedings consistent with this decision.

WRIT GRANTED; TRIAL COURT JUDGMENT AFFIRMED IN PART AND REVERSED IN PART; REMANDED.

*1 LOBRANO, Judge, concurring.

I concur with the majority result on both the status and federal pre-emption issues. However, I am not satisfied with test used in Haydel v. Hercules Transport Inc., 94-1246 (La.App. 1st Cir. 4/7/95), 654 So.2d 418, writ denied, 95-1172 (La. 6/23/95), 656 So.2d 1019 to determine if a state statute is preempted by federal legislation. In my opinion a more straightforward and concise test should be whether the state statute conflicts with and is contrary to the purpose or result of a federal statute. If so, then the state statute should give way to the federal legislation.

In the instant case La.C.C. art. 2315.3 does not conflict with federal legislation.

Copr. (C) West 1996 No claim to orig. U.S. govt. work
675 So.2d 1121
(Cite as: 96-0977 (La. 6/28/96), 675 So.2d 1121)

In re NEW ORLEANS TRAIN CAR LEAKAGE EXPLOSION LITIGATION.

No. 96-CC-0977.

Supreme Court of Louisiana.

June 28, 1996.

Prior report: La.App., 671 So.2d 540.

In re CSX Transportation Co.;--Defendant(s); applying for supervisory and/or remedial writs; Parish of Orleans, Civil District Court, Div. "B", No. 87- 16374; to the Court of Appeal, Fourth Circuit, No. 95CW-2710.

Denied. Relator may reraise the issue on appeal in the event of an adverse judgment.

JOHNSON, J., not on panel; recused.

E1

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CYNTHIA GALJOUR, *et al**	**CIVIL ACTION**
versus*	**NO. 87-5003**
GENERAL AMERICAN TANK CAR*	
CORPORATION, *et al*	**SECTION "I"**
*	**JUDGE MENTZ**
*	**MAGISTRATE NO. 6**
	MAGISTRATE MOORE
*	

DATE OF ENTRY JUL 7 1992

54(b) JUDGMENT

For the reasons set forth in the Minute Entry dated April 27, 1989, dismissing the claims of several of the plaintiffs for failure to respond to discovery requests; the Order dated December 11, 1990, granting Joint Motion of plaintiffs and CSX Transportation, Inc., to dismiss the claims under La. Civ. Code art. 2315.3; the Minute Entry dated April 11, 1990, dismissing certain allegations; the Minute Entry dated June 28, 1991, dismissing the claims for punitive damages asserted against CSX Transportation, Inc.; and the Minute Entry dated December 12, 1991, *inter alia*, granting the Motion for Summary Judgment on Remaining Claims brought by CSX Transportation, Inc., in the captioned matter;

And further expressly determining and certifying, pursuant to Fed.R.Civ.P.54(b), that there is no just reason for delay of entry of this Final Judgment; accordingly:

***2IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Final Judgment be and is hereby rendered in favor of Defendant, CSX Transportation, Inc., and against Plaintiffs, each party to bear their own costs.

New Orleans, Louisiana, this 6th day of July, 1992.

/s/ Henry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

*1UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MINUTE ENTRY
DECEMBER 12, 1991
MENTZ, J.

CYNTHIA GALJOUR, ET AL.	CIVIL ACTION
VERSUS	NO. 87-5003 AND CONSOLIDATED CASES
GENERAL AMERICAN TANK CAR	SECTION "I" (6)

Having reviewed the pending motions, the parties' briefs, and the applicable law,

IT IS ORDERED that:

(1) The Motion of Defendant, CSX Transportation, Inc., For Summary Judgment on Remaining Claims is GRANTED, dismissing the following claims against CSXT:

a) Galjour (C.A. No. 87-5003)(¶¶ 17, 18, and 21(a)-(c), (f), and (g) of their Third Supplemental and Amending Complaint):

In accordance with 45 U.S.C. § 434, the Court examined each of the plaintiffs' claims to determine whether there are any federal regulations that were promulgated by the Secretary that cover the conduct in issue. The Secretary of Transportation has promulgated regulations governing interchange inspection of tank cars carrying hazardous materials for the purpose of determining that it is safe for transportation and is not leaking. See 49 C.F.R. §174, 215.203, and 215, Appendix D. Thus, the plain-

tiffs' state law negligence claims against CSXT based on failure to inspect and detect leaking (¶¶ 21 (a), (b), and (f) of the Third Supplemental and Amending Complaint), are preempted. See 45 U.S.C. §434; Easterwood v. CSX Transportation, 933 F.2d 1548 (11th Cir. 1990).

*2The plaintiffs' negligence claims against CSX Transportation based on: failure to prevent or minimize the leakage, explosion, and fire; delivering and spotting the car in a heavily populated area; and failing to take appropriate action to remove the tank car from the heavily populated area after notice of imminent danger, are not preempted because the Secretary has not promulgated regulations covering these subjects. The claims must nevertheless fail because the plaintiffs have submitted no evidence to support these claims. There being no genuine issue of material fact, CSXT is entitled to judgment as a matter of law dismissing the plaintiffs' claims asserted against in paragraph 21 (c), (f), and (g) of the Third Supplemental and Amending Complaint. See id.

The plaintiffs submitted no evidence to support their claims that CSXT had custody or garde of the tank car within the meaning of Louisiana Civil Code art. 2317, see Ross v. La Coste de Monterville, 502 So. 2d 1026, 1032 (La. 1987), and that the transportation of butadiene is a nuisance of ultrahazardous activity within the meaning of Louisiana Civil Code article 667, see Hawkins v. Evans Cooperage Co., Inc., 766 F.2d 904, 907 (5th Cir. 1985); Indiana Harbor Belt R. Co. v. American Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990). There being no genuine issue of material fact, CSXT is entitled to judgment as a matter of law on the claims asserted in paragraphs 17 and 18 of the Third Supplemental and Amending Complaint.

b) Vaccarella (C.A. No. 88-787) ¶¶4(a)-(c), (f)-(h), 10, and 11 of their First Supplemental and Amending Complaint:

*3The following negligence claims against CSXT in the First Supplemental and Amending Complaint are unsupported by any evidence: ¶4(a) ("Using defective and/or improperly maintained tracks and/or other equipment to handle the aforementioned tank car"); ¶4(b) ("Failing to take effective action to prevent further leakage or explosion when it had ample opportunity to do so); ¶4(c) ("Failing to properly ... supervise and maintain the railroad tracks and the tank car in a proper and prudence manner"); ¶4(f) ("Failure to exercise proper care on the basis of what it knew or should have known"); ¶4(g) ("Violations of various pertinent Federal Regulations and Statutes, State Statutes and Municipal Ordinances"); and ¶4(h) ("Other acts of negligence to be shown at the trial of this matter"). The plaintiffs have offered no evidence show that CSXT was negligent in any way.

The plaintiffs' claim against CSXT in ¶4(c) alleging failure to inspect the tank car is preempted by federal regulations, see 45 U.S.C. §434 and 49 C.F.R. §174, and further, is unsupported by any evidence.

The plaintiffs submitted no evidence to support their claims contained in paragraphs 10 and 11 that CSXT had custody or garde of the tank within the meaning of Louisiana Civil Code article 2317, see Ross, 502 So. 2d at 1032, or that the transportation of butadiene is a nuisance or ultrahazardous activity within the meaning of Louisiana Civil Code article 667, see Hawkins, 766 F.2d at 907.

Accordingly, CSXT is entitled to judgment as a matter of law *4dismissing all of the plaintiffs' claims against it in para-

graphs 4(a)-(c), (f)(h), 10, and 11 of their First Supplemental and Amending Complaint.

(c) Carter (C.A. No. 88-3979) ¶¶ VII-X of their Complaint for Damages:

The Carter plaintiffs did not file an opposition to CSXT's motion. The Court has reviewed the motion and finds that CSXT has satisfied its burden of proof to show the absence of any genuine issues of material fact. Therefore, CSXT is entitled to judgment as a matter of law dismissing the plaintiffs' claim against it asserted in paragraphs VIII-X of their Complaint for Damages.

(2) The Motion of Defendant, Illinois Central Railroad Company, for Summary Judgment is GRANTED, dismissing in 87-5003 and 88-787 the plaintiffs' claims against Illinois Central for exemplary damages. The plaintiffs submitted no evidence to show that Illinois Central acted wantonly or recklessly within the meaning of Louisiana Civil Code article 2315.3. Thus, the plaintiffs have failed to raise a genuine issue of material fact regarding Illinois Central's liability for punitive damages, and Illinois Central is entitled to summary judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

(3) The motion of Defendants, Norfolk Southern Corporation and Norfolk Southern Railway Company, for Summary Judgment is GRANTED and the Motion of Defendant, Alabama Great Southern Railroad Company, for Summary Judgment is GRANTED, dismissing in 87-5003, 88-787, and 88-3979 all claims against Norfolk Southern *5Corporation, Norfolk Southern Railway Corporation, and Alabama Great Southern Railroad Company. The plaintiffs have no substantial evidence to support

their claims against these defendants. There is no evidence that NSC, NSRC, or AGSRC were involved in the tank car movement. Further, there is no substantial evidence to support the plaintiff's position that the NOTC crew that moved the tank car was the borrowed servant of any of these companies, or that these companies are essentially one entity. Accordingly, NSC, NSRC, and AGSRC are entitled to judgment as a matter of law dismissing all claims against them.

(4) Motion of Plaintiffs For Review of Magistrate's Order is DENIED. Insofar as this motion seeks to add NOTC as a direct defendant, the motion presents no new facts or legal argument from those considered by the Court on the plaintiffs' first motion to add NOTC as a defendant. See Minute Entry dated December 15, 1988 denying plaintiff's motion to amend. Further, the Magistrate's ruling is not clearly erroneous. The Court notes that after the December 15, 1988 ruling, the Court denied the plaintiff's motion to reconsider and the Fifth Circuit denied the plaintiff's petition for a writ of mandamus.

Clerk to serve all counsel. /s/ H.M.

(2)

Supreme Court, U.S.
FILED
OCT 25 1996
CLERK

NO. 96-499

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

CSX Transportation, Inc., *Petitioner,*

v.

Leonard Adams, *et al., Respondents.*

On Petition for a Writ of Certiorari
To the Louisiana Court of Appeal, Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

CSX TRANSPORTATION, INC., *Petitioner*,

v.

LEONARD ADAMS, *et al.*, *Respondents*,

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FOURTH CIRCUIT

Respondents, being the Class of plaintiffs in this Class Action, respectfully present this opposition to the petition for a writ of certiorari filed on behalf of CSX Transportation ("CSXT") to review the decree of the Louisiana Court of Appeal, Fourth Circuit, in this case.

OPPOSITION TO STATEMENT OF JURISDICTION

The Supreme Court of the United States lacks appropriate jurisdiction to review the decree of the Louisiana Court of Appeal since it is not a final judgment of the highest court of the state from which the application for a writ of certiorari is sought.

The decree of the Louisiana Court of Appeal is not a "final judgment" within the intent of 28 U.S.C. 1257(a) and Rule 10 of the Court, as interpreted in Cox Broadcasting Corp. et al. v. Cohn, 420 U.S.469, 98 S.Ct. 1029, 42 L.Ed.2d 328 (1975). The denial by the Louisiana Supreme Court of CSXT's application for certiorari or review of the Court of Appeal's decision reserved CSXT's right to reraise the question on appeal in the event of an adverse judgment. Under 28 U.S.C. 1257(a) this Court may review final judgments or decrees rendered by the highest court of a state in which a decision could be had on issue therein enumerated. Under the interpretation of this statute by the Court in Cox, *supra*, only the first of the four exceptions, enumerated and discussed therein, from the finality rule in the case of a decision by an intermediate state court could have application in this case. That exception refers to those cases "in which there are further proceedings -- even entire trials -- yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings is preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final." Cox, 420 U.S. at 477, 95 S.Ct. at 1037.

For the reasons set forth hereinbelow the federal issue is neither conclusive nor the outcome of further proceedings preordained by any final judgment in state court; hence, CSXT's petition for a writ of certiorari should be denied.

MODIFICATION OF THE STATEMENT OF THE CASE

There are material omissions and misstatements in petitioner's statement of the case which must be supplemented or corrected in order to comply with respondents' obligation under Rule 15.1 of this Court.

First, respondents note Footnote 1 of CSXT's statement of the case which implies that Louisiana's exemplary damage statute, La.Civ.Code art. 2315.3 has been repealed and may no longer affect the issues in this case. That implication is incorrect. The repeal of Article 2315.3 by its express terms does not apply to actions brought before the effective date of repeal. The accident in this case occurred in 1987. The repeal has no pertinent effect on the issues in this case.

Second, CSXT states that "plaintiffs' claims for state-law punitive damages rests solely on their allegation that CSXT's failure to inspect the tank car immediately and/or to receive the car from NOTC in person constitutes wanton and reckless conduct under Article 2315.3 of the Louisiana Civil Code." Petition, p. 6, B. Plaintiffs' Claim for Punitive Damages. On page 10 of its petition, under the caption **REASONS FOR GRANTING THE WRIT**, CSXT makes the statement that "Plaintiffs' punitive damage claim against CSXT is based solely on their allegation that CSXT breached an alleged duty to be present to immediately inspect the Tank Car upon its arrival at the interchange."

These statements of CSXT are belied by the allegations made by respondents in their petition. As reflected in the factual findings made by the Louisiana Court of Appeal, Pet.App. C1-C10, the subject tank car passed through the hands of several carriers prior to its arrival at CSXT's

interchange yard. After it was loaded with butadiene at Goodhope, Louisiana, the tank car was picked up by Illinois Central Railroad Company and transported to a point where it was transferred to New Orleans Terminal Company (NOTC) which then delivered it to CSXT's interchange yard. At some point in time the leakage of butadiene from the tank car commenced. That time has not been established for summary judgment purposes. What is known is that the tank car was delivered to the CSXT interchange at 7:25 p.m. in the evening before the explosion, that an unusual odor was detected in the interchange yard beginning at approximately 9:30 p.m., sufficient to cause nearby residents to report it to authorities, and that the leaking butadiene ignited and exploded at approximately 1:55 a.m. the following morning.

In their petition, respondents alleged the above facts and particularized fault on the part of all carriers for transporting the tank car and its hazardous cargo through and into a heavily populated area, and for maintaining it in that area without exercising the high degree of care placed upon them by Louisiana law. Respondents further alleged that one or more of these defendant carriers had the necessary *garde*[1] of the tank car and its contents, which under applicable Louisiana law was sufficient to impose strict liability for an unreasonable risk of harm.

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[1] *Garde* is the obligation imposed by Louisiana Law on the proprietor of a thing, or on one who avails himself of it, to prevent it from causing damage to others. The things in one's care are those things to which one bears such a relationship as to have the right of direction and control over them, and to draw some kind of benefit from them. King vs. Louviere, 543 So.2d 1327,1329 (LA.1989).

Specifically as to CSXT, respondents alleged that the owner of the interchange yard (now being determined to have been CSXT) incurred strict and/or absolute liability under applicable Louisiana law to persons or property in the vicinage of the interchange yard.

As to allegations of negligence, respondents alleged that each carrier defendant (which would include CSXT) failed to properly inspect the tank car at the times when it was in their respective possession or control, or at the times when they were under a duty to inspect the car, to assure that it was reasonably safe for the transportation of hazardous substances; that each failed to exercise the high degree of care imposed on it in the transportation of a hazardous chemical to prevent or minimize the chance of leakage, explosion and fire occurring; that the indicated carrier (which would include CSXT) failed to take appropriate action to remove the tank car from the heavily populated area, or otherwise respond, after it had notice of the imminent danger presented by the tank car and when it had reasonable opportunity to minimize that danger.

Thus the alleged failure to inspect the tank car, which appears to be the linchpin of CSXT's petition, is but one of the issues of fault and liability attributed by the respondents to CSXT.

In addition, respondents alleged that the circumstances of the incident demonstrate a compelling need for the design and implementation of an adequate system of monitoring the

interchange yard and the cars thereon to assure immediate attention and warning to nearby residents.[2]

Finally, on page 9 of the petition, under the caption D. Rulings below., CSXT refers to a ruling of the United States District Court in a parallel federal court proceedings arising out of the same fire as deciding that the "exact same basis of Plaintiffs' 2315.3 claim" has been found to have been preempted by federal law. This statement is misleading to the extent that it implies that the only basis for respondents' 2315.3 claim against CSXT had been found by the federal district judge to have been preempted by federal law in the cited Galjour case.[3] Reference to the entire statement in the federal court opinion, as set forth in Pet.App.E1-7, shows that while the district court found that "plaintiffs' state law negligence claims...are preempted," he also found that CSXT's "(f)ailure to prevent or minimize the leakage, explosion, and fire; delivering and spotting the car in a heavily populated area; and failing to take appropriate action to remove the tank car from the heavily populated area after notice of the imminent danger, are not preempted because the

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[2] These allegations were directed to the need for injunctive or other appropriate relief against the defendants found to be the owners and/or operators and/or users of the interchange. While not a specific allegation of fault, it nonetheless placed the carriers, including CSXT, on notice of a factual basis for the fault otherwise alleged in the petition, sufficient to permit evidence thereof in support of the specific fault allegations.

[3] Galjour v. General American Tank Car, No. 87-5003 (E.D. La. 12/12/91), Pet.App.E1-E7, was an independent action, brought and prosecuted separate and apart from the class action. The class action defendants' repeated efforts to obtain some sort of collateral estoppel flowing from the Galjour decisions have come to naught.

secretary has not promulgated regulations covering these subjects."[4]

SUMMARY OF ARGUMENT

CSXT has failed to prove, in support of its motion for summary judgment, lack of fault on its part that contributed to the cause of the explosion sued on in this class action, sufficient under Louisiana law to require the dismissal of the exemplary damage claim asserted against it. The federal regulation regarding forwarding of the tank car within a 48-hour period does not refer to when inspections should be made within that time. The federal regulation regarding the nature or extent of inspection of the tank car in question does not specify the time within which such inspection must be made. Having the custody and responsibility for the tank car sufficient to satisfy the *garde* requirements of Louisiana law, CSXT may be strictly liable or liable without fault for damages caused by its defective condition. If its conduct in that regard was sufficient to constitute reckless handling, storage or transportation of a hazardous substance, it may likewise be liable for exemplary damages. Neither actions would be preempted by FRSA because of the lack of any regulations covering such state-law delicts. Thus, the federal

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[4] While it is true that the federal district judge dismissed the state law claims "because the plaintiffs have submitted no evidence to support these claims," the federal procedure and Louisiana procedure governing summary judgment were at that time "vastly different," as noted by the state district judge in sustaining his denial of CSXT's motion. Pet.App. B3-4. This difference will be discussed further in this opposition.

issues in this action are neither conclusive nor preordained in the state court proceedings at its present stage, and certiorari should be denied.

ARGUMENT

A. Burden of Proof.

Under Louisiana law applicable to summary judgment procedure in effect at the time CSXT's motion was filed, the burden of showing that there is not a genuine issue of material fact in dispute is upon mover for summary judgment, and any doubt is resolved against granting of summary judgment and in favor of trial on the merits to resolve disputed facts. Thornhill v. Black, Sivalls & Bryson, Inc., 394 So.2d 1189 (La.1981). The contrast between summary judgment practice under Louisiana and federal law was drawn by the Louisiana Supreme Court in Sassone v. Elder, 626 So.2d 345, 351 (La.1983). Simply stated, the difference between the two is that in federal summary judgment practice, when the nonmoving party bears the burden of proof at trial, there is no genuine issue of material fact if the nonmoving party cannot come forward at the summary judgment stage with evidence of such sufficient quantity and quality for a reasonable juror to find the party can satisfy his substantive evidentiary burden. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

B. The Federal Regulations Relied Upon by CSXT.

CSXT maintains that the only issue determinative of CSXT's liability in this case pertains to its duty to inspect the tank car and to detect its leakage of the hazardous substance which caused the damages for which this action was brought.

In that regard, CSXT maintains that federal regulations promulgated under the Federal Railway Safety Act (FRSA), 45 U.S.C. §434, cited and quoted *verbatim* on pages 12-13 of the petition, preempted state law with regard to the duty to inspect, and since it, CSXT, complied with those regulations it can have no liability in this case.

The federal regulations cited by CSXT in support of its position are 49 C.F.R. §§ 174.14(a), 174.8(b), quoted verbatim on pages 15-16 of its petition.

Subsection 174.14(a) provides that a carrier at an interchange yard must forward each shipment of hazardous materials promptly and within 48 hours after acceptance at the originating point or receipt at the interchange point. In the case of CSXT, the shipment of butadiene was received at CSXT's interchange yard some nine hours before the explosion. Thus, CSXT reasons, since it had 48 hours within which to inspect the tank car, it had no duty to inspect it sooner. However, the cited regulation says nothing about inspection; it pertains only to forwarding.

Subsection 174.18(b) pertains only to what must be done when a train is required to be inspected. It says nothing about when such inspection must take place.

In sum, CSXT has not cited any federal regulation that exempts it from the duty to inspect the tank car at any given time while the tank car was in its possession and located on its property. Under the express provisions of FRSA §434, "A state may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement." The

absence of a regulation precludes preemption in such cases; nor can it be said that preemption may be implied in the absence of a regulation where there has be no Congressional intent to occupy the field exclusively or where the state law is in actual conflict with federal law. Freightliner Corporation v. Myrick, __U.S.___, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 185 (1995).

C. Preemption of CSXT's Duty to Inspect.

CSXT does not dispute delivery of the subject tank car to its interchange yard. CSXT cannot dispute that under an arbitrated ruling by the Association of American Railroads Transportation Division Committee, regarding a dispute between CSXT and another railroad in an unrelated case involving the exact issue, interchange between NOTC and CSXT took place upon delivery and "makes the receiving road responsible for the cars, contents and car hire until any rejected cars are returned to the delivery road."[5]

Having the subject tank car in its possession and under its control, in a location on its property located in this heavily populated area within the City of New Orleans, CSXT was thereby exposed to liability in several respects.

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[5] This is contained in NOTC's opposition to CXST's motion for summary judgment in the trial court below. In view of CSXT's admission on page 7 of its petition that it "had received notice from NOTC that NOTC had placed the Tank Car on the interchange track," respondents will not burden this opposition with inclusion of NOTC's opposition and affidavit in support thereof, unless CSXT seeks to controvert the accuracy of respondents' recited summary.

While CSXT maintains that it had no duty to inspect the tank car before the lapse of 48 hours from delivery, its reliance on CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 1113 S.Ct.1732, 123 L.Ed.2d 387 (1993) is misplaced. The general rule in the context of this case, as enunciated by the Court in Easterwood, with paraphrasing supplied by brackets, is:

> "..the issue before the Court is whether the Secretary of Transportation has issued regulations covering the same subject matter as [Louisiana negligence law pertaining to the inspection of cars loaded with hazardous materials while located on a railroad interchange]. To prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than that they "touch upon" or "relate to" that subject matter.....for "covering" is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." Easterwood at 507 U.S. at 664. 1113 S.Ct. at 1738.

With regard to the preemptive effect of a federally-imposed speed limit on trains, the Court in Easterwood did not address whether preemption of speed would relieve the railroad defendant from liability for breach of other state-law duties such as responding to an evident and immediate hazard, apparently because of the concession of CSXT set forth in Footnote 15 of the opinion. Easterwood at 507 U.S. at 675, 1113 S.Ct. at 1743:

> "FN15. Petitioner is prepared to concede that the pre-emption of respondent's excessive speed claim does not bar suit for breach of related tort law duties,

> such as the duty to slow or stop a train to avoid a specific, individual hazard. Reply Brief for Petitioner in No. 91-790, p. 3. As respondent's complaint alleges only that petitioner's train was traveling too quickly given the "time and place," App. 4, this case does not present, and we do not address, the question of FRSA's pre-emptive effect on such related claims."

However, the Court's silence on this point may have been due to its agreement with the effect of the concession, for as stated by Mr. Justice Thomas in his concurrence in part and dissent in part:

> "Indeed, CSX admits that it shoulders a state-law duty to take measures against crossing accidents, including an "attempt to stop or slow the train if possible to avoid a collision." [FN1] Reply Brief for Petitioner in No. 91-790, p. 3. The Court effectively agrees, as is evident from its decision to limit its opinion to a common-law negligence action for excessive speed and from its refusal to address related state-law claims for the violation of a statutory speed limit or the failure to avoid a specific hazard." Easterwood at 507 U.S. at 676-677, 1113 S.Ct. at 1744.

In the case now before the Court, it is apparent that the federal regulations cited by and relied upon by CSXT simply do not operate to cover liability imposed by state law for failure to comply with the duty to inspect tank cars loaded with hazardous materials, delivered into its possession and placed on its property. That duty may arise actively or passively. The issues affecting the nature and extent of CSXT's duty of inspection during the crucial nine hour period, so as to create liability for the requisite compensatory

damages sufficient to bring Article 2315.3 into consideration have not been subject to adjudication, by motion for summary judgment or otherwise, in the sequencing orders of the Louisiana trial court. Petition, p. 8 and fn. 4 thereon.

D. Liability of CSXT Independent of Duty to Inspect.

Even if CSXT could convince the Louisiana trial court that it had no duty to inspect the tank car, or insufficient notice of a danger or time within which to make the inspection, Louisiana law applicable to strict liability arising solely from CSXT's *garde* of the tank or strict liability arising from the fact that the tank car was in its possession and on its property may be sufficient under Louisiana law to impose strict liability under Louisiana law.

Strict liability under Louisiana law, applicable to this case, encompasses all of the necessary elements sufficient to establish negligence except in one very important respect: notice or prior knowledge of the potentially harm-causing defect of the thing in the *garde* of the defendant. The Louisiana concept of *garde* and obligations flowing from it are succinctly discussed in King v. Louviere, 543 So.2d 1327, 1328-29 (La.1989). That prior lack of notice or knowledge of the defect and its potential danger is no defense to this strict liability was established under La.Civ.Code art. 2317, Opp.App.A, in the seminal Louisiana Supreme Court decision in Loescher v. Parr, 324 So.2d 446 (La.1975), stating the general rule applicable to this case:[6]

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[6] La. Civ. Code art. 2317, insofar as it has been interpreted to exclude prior notice or knowledge was repealed by the Louisiana legislature in 1996 with the provision that the repeal does not apply to actions arising prior to the repeal.

> "When harm results from the conduct or defect of a person or thing which creates an unreasonable risk of harm to others, a person legally responsible under these code articles for the supervision, care, or guardianship of the person or thing may be held liable for the damage thus caused, despite the fact that no personal negligent act or inattention on the former's part is proved. The liability arises from his legal relationship to the person or thing whose conduct or defect creates an unreasonable risk of injuries to others."

Likewise, under Louisiana law, the owner of property may be liable without fault to persons and property in the vicinage. In the interpretation of La.Civ.Code art 667, Opp.App.A, the Louisiana Supreme Court held in Hero Lands Co. v. Texaco, Inc., 310 So.2d 93, 97 (La.1975):

> "As expressed in the Article, the principle is a limitation the law imposes upon the rights of proprietors in the use of their property. It is a species of legal servitude in favor of neighboring property, an expression of the principle of *Sic utere*. An activity, then, which causes damage to a neighbor's property obliges the actor to repair the damage, even though his actions are prudent by usual standards. It is not the manner in which the activity is carried on which is significant; it is the fact that the activity cases damage to a neighbor which is relevant. (Citing case). The article expresses, as this Court has often stated, a doctrine of strict liability which does not depend upon deliction."

Facts alleged in respondents' petition in the state court

proceedings have not been controverted in this proceeding since the issues relating to compensatory damages have not been subject to summary judgment procedure in the sequencing order of the trial court. However, if the facts, when presented in the appropriate manner, support a claim for compensatory damages against CSXT in the above respects then the claim for exemplary damages would be ripe for adjudication, not before.

CONCLUSION

CSXT has failed to raise the implication of a controlling federal regulation promulgated under FRSA, which covers the allegations of liability, with or without fault, asserted against CSXT in the prosecution of the compensatory and exemplary damages issues now pending in Louisiana state court. Accordingly, there are no conclusive or preordained federal questions that have been presented to the Louisiana courts, much less adjudicated by the highest Louisiana court or finally adjudicated by the Louisiana intermediate court.

For these reasons, CSXT's petition for writ of certiorari should be denied.

Respectfully submitted:

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APPENDIX A

Louisiana Revised Civil Code of 1950

Art. 667. Limitations on use of property

Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which might cause any damage to him.

Art. 2317. Acts of others and of things in custody

We are responsible, not only for the damages occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to understood with the following modifications.

[There follows six articles dealing with acts of minors; acts of insane persons; acts of servants, students or apprentices; damage caused by animals; damage caused by ruin of buildings; and users of blood, organs, or tissue; a medical service; none of which are produced in this Appendix because they have no relevance to this action.]